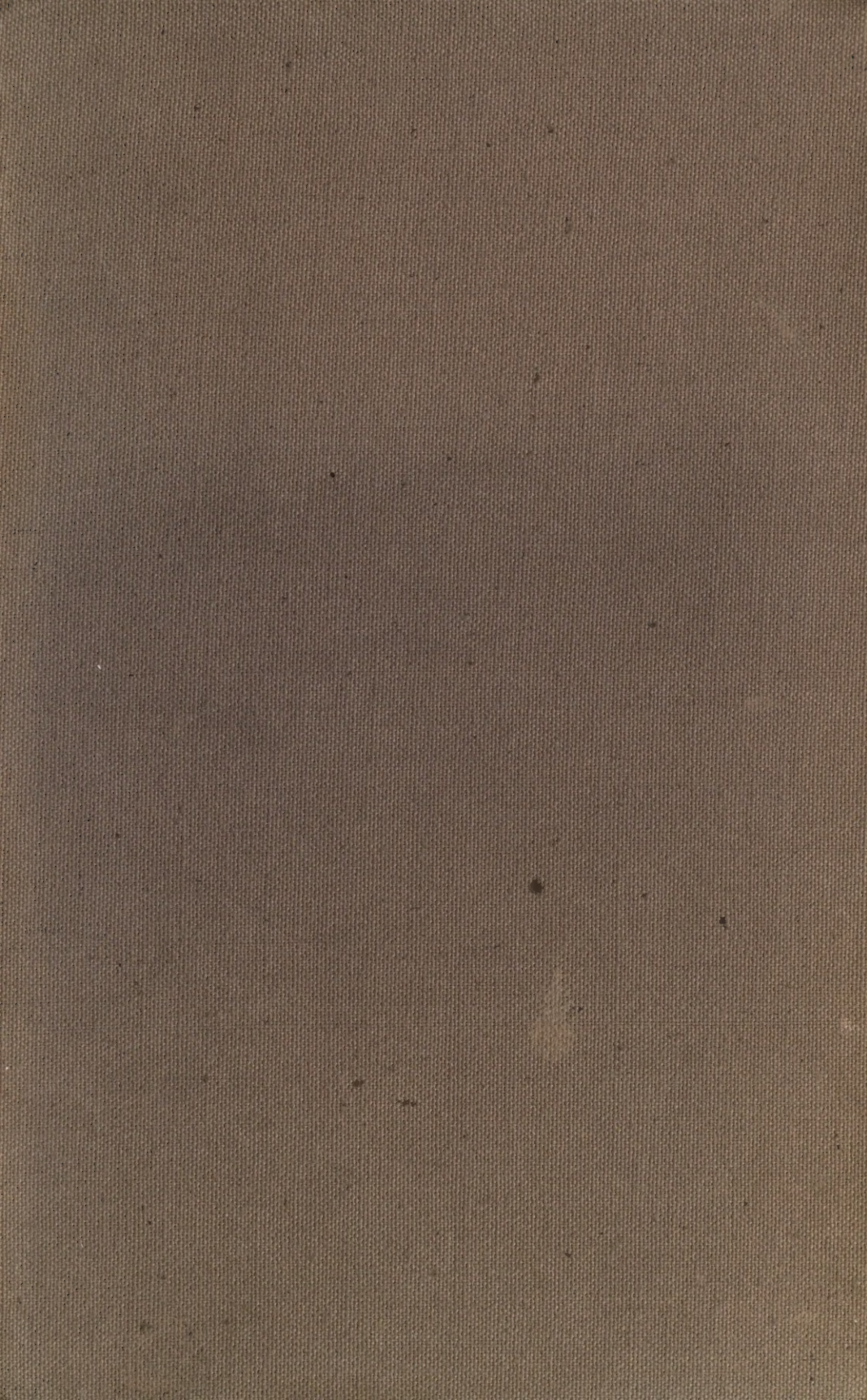










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REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD
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BY ABBOTT BROTHERS,
COUNSELLORS AT LAW.

VOL. X.

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ABBOTTS' PRACTICE REPORTS.

NEW-YORK.

VIELE *a.* GRAY.

New York Common Pleas ; Special Term, December, 1859.

DEFAMATION.—COMPLAINT.

To say of a man, after a libel has been published, that he is the author of it, is actionable *per se*.

Where one of a board of public officers, at a meeting of the board—while a resolution was pending, recommending the employment of the plaintiff—declared that he knew that the plaintiff was the author of an obscene caricature, which had been published to ridicule one of the official acts of the board, and which was also a libel upon individuals,

Held, 1. That the charge was pertinent to the subject under discussion, and was conditionally privileged.

2. That, to entitle the plaintiff to maintain an action for defamation, he must establish that the charge was made without reasonable or probable cause.

3. That the defendant having declared that he knew that the plaintiff was the author of the caricature, without indicating what he relied upon for making the assertion, an averment in the complaint that the plaintiff was not the author, and had no complicity therein, was sufficient, *prima facie*, to show that there was a want of probable cause.

Where the occasion upon which the words are spoken repels any presumption of malice, and proof of it is necessary to maintain the action, it is sufficient to aver that they were spoken maliciously, without setting forth, in the complaint, the facts and circumstances which show the existence of malice.

What is meant by the term *malice*, explained; and the dictum, in *Brommage v. Prossor* (4 B. & C., 247), that there are two kinds in actions for defamation, and a distinction between the word in its popular and its legal sense, declared to be erroneous.

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Demurrer to complaint.

The action was for slander. The facts are stated in the opinion.

C. A. Seward, for the demurrer.

R. O. Gorman, opposed.

DALY, F. J.—The complaint avers that a scandalous, criminal, and obscene libel, was published by some person unknown to the plaintiff, of and concerning Messrs. Olmstead and Vaux, who had submitted a plan for the improvement of the Central Park, and the editor of the Evening Post, being an obscene caricature, a copy of which is annexed to the complaint, and that the defendant at a meeting of, and in the hearing of the commissioners of the Central Park, referring to this caricature, said of the plaintiff: "He is the author of it, I know it." The first objection raised by the demurrer is, that this was not imputing to the plaintiff any offence involving moral turpitude, or which would subject him to an infamous punishment. That an indictment would lie for publishing this caricature does not admit of a doubt. (*Austin a. Culpepper*, *Skinner R.*, 123; 2 *Holt*, 313; *Anon.*, 11; *Mod.*, 99; *DuBort a. Beresford*, 2 *Camp.*, 511.) It was not only a libel upon the persons designed to be affected by it, but as an obscene caricature, it was an offence against public morality. (*The King a. Curl*, 2 *Strange*, 788; 1 *Russell on Crimes*, 233.) The defendant insists, however, that to say of a man that he published a libel, is not actionable *per se*. In *Young a. Miller* (3 *Hill*, 21), it was held, that to charge a man with a crime for which he might be indicted, and which would be disgraceful to him in a general sense, that is, which would detract from his character as a man of good morals, was actionable, and certainly to charge a man with publishing an obscene caricature, which was also a libel upon individuals, is to impute to him an offence which would have that effect. But the point has been expressly passed upon. It was held in *Sir William Russell a. Lignor* (1 *Roll. Abr.*, 46; 1 *D'Au. Abr.*, 98; *Vin. Abr.*, 423, pl. 27), that to say of A. "that he made a libel on B.," A. being a justice of the peace, was actionable. It was objected in that case that it did not appear what the effect of the libel was, but the court were of opinion that it was enough to say of a justice

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of the peace, that he had made a libel, as it was imputing to him an offence for which he could be indicted at common law, and subjected to fine and imprisonment; and in *Andrew a. Kappenheofer* (3 *Serg. & Rawl.*, 258), it was held that words charging another with making a libel were actionable.

It is further insisted that the offence did not consist in designing and drawing the caricature, but in publishing it, and that saying that the plaintiff was the author of it, was not charging him with having published it.

It is averred, however, in the complaint, that the caricature had been published before the speaking of the words, by the sending of copies of it to all the commissioners, and to say of a man after a libel has been published, that he is the author of it, is to convey the imputation that he is connected with the publication, or at least that he was an actor or principal in the criminal act. In the *Queen a. Lovett* (9 *C. & P.*, 462), all that was proved against the defendant was, that the manuscript from which the libel was printed was in his handwriting. There was no other evidence to connect him with the printing or the posting of it, yet this was deemed sufficient to sustain the indictment, and upon this evidence alone he was convicted; and Lord Tenterden, in *Sir Francis Burdett's case* (4 *B. & Ald.*, 95), went even farther: "I have heard nothing," he said, "on the present occasion, to convince my mind that one who writes or composes a libel with intent to defame, may not under any circumstances be punished if the libel is not published." In *The King a. Paine* (5 *Mod.*, 163), the court said that the making of a libel was an offence, though it never were published, and similar views have been expressed in several cases. (*The King a. Beare*, 1 *Ld. Ray*, 414; *S. C.*, 2 *Salk.*, 417; *S. C.*, *Carthew*, 407; *S. C.*, *Cases Temp. Holt*, 422; *S. C.*, 12 *Mod.*, 218; *Lamb's Case*, 9 *Coke*, 59; *The King a. Kisell*, 1 *Barnds*, 305; *The King a. Williams*, 2 *Camp.*, 646.) Where then a libel has been published, it is very clear from these authorities that it is actionable to say that a man is the author of it.

The next question is, whether the statement made by the defendant was a privileged communication. It was made at a meeting of the Board of Commissioners of which the defendant was a member, after a resolution had been offered by one of the commissioners that the architect-in-chief should be requested to

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employ the plaintiff as engineer of the Central Park. Any communication or statement, made in the discharge of a legal or moral duty which may be considered applicable or pertinent to the duty which the party is engaged in discharging, is privileged, however injurious it may be to individuals, unless it appears to have been done from a malicious and mischievous design to injure the character of the person to whom it refers. The commissioners of the Central Park were a public body, discharging to the extent of the power conferred upon them, the functions of government, and the defendant as a member of the body was a public officer. Whatever, therefore, he might say at the deliberations of the Board of Commissioners bearing upon, or having relation to, any matter within their cognizance, would be presumptively privileged. The matter before them was the propriety of adopting the resolution requesting the architect-in-chief to employ the plaintiff as engineer, and a statement that the plaintiff was the author of a production designed to caricature and hold up to ridicule the plan which the commissioners had adopted for the improvement of the Central Park, whether it were true or not, must be regarded as relevant and pertinent to the subject before them. It is not for a court of law to say that it was a matter which they ought not or could not take into consideration. The commissioners alone were to judge of the reasons which should influence them to vote for or against the resolution; and that they considered it material appears from the averment in the complaint, that in consequence of the statement the resolution was lost. Concluding then, from the occasion upon which the charge was made, and the relevancy of the subject-matter of it, that it was presumptively privileged, the next question raised by the demurrer is, whether there is a sufficient averment that it was made from malice. It is maintained that the general averment in the complaint, that the words were spoken maliciously, is not enough; that it is nothing more than an averment of that malice in law, which exists whenever the words are actionable, but that in a case like this, where it appears upon the face of the complaint that the occasion was a privileged one, the complaint must contain a specific averment of the facts and circumstances which show conclusively that the words were spoken from actual malice, or that a cause of action is not made out.

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In passing upon the question of the sufficiency of the complaint in this particular, it will be necessary first, to have a clear understanding of what is meant in actions of defamation by the term malice; for it must be confessed that there is at present considerable obscurity as to the sense in which it is to be understood in actions of this nature, growing out of a distinction taken by BAYLEY, J., in *Brommage v. Prossor* (4 *B. & C.*, 247), between what he calls malice in law, and malice in fact. He says that the law recognizes two descriptions of malice in actions of slander; that malice in its common acceptation or popular sense means ill-will to a person, but in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse. I apprehend that there is no ground for distinguishing between the legal and the popular sense of the word, and that it means in its legal sense exactly what it means in its popular sense, namely, a mischievous design or intent to do an injury to an individual, or to the public. Crabbe, in his work on English synonyms, after tracing the word to its Latin root, *malus*, bad, defines it to be the very essence of badness lying in the heart; the love of evil for evil's sake, as where a man is impelled to do mischief to those who never injured him; and it is in this disposition to injure from what he calls an abandoned heart, that Blackstone understood it, in its legal sense. (4 *Comm.*, 200.) Lord Holt distinguishes it from *hatred* or *rancor*, which may exist simply as a feeling, but the intention to injure being an ingredient in malice, he defines it to be "a design formed of doing mischief to another." (*The Queen v. Mawgridge*, *Kely R.*, 127.) Chief-justice Russell in his work on crimes, refers to it "as a term of law denoting directly wickedness, and excluding just cause or excuse" (1 *Russell on Crimes*, 483); and BEST, J., in *The King v. Harvey* (2 *B. & C.*, 257), which was an indictment for libel, defines it to be "any wicked or mischievous intention of the mind." In criminal prosecutions for libel, this malice or wicked and mischievous intention of the mind, is of the very essence of the offence. (*Commonwealth v. Clapp*, 4 *Mass R.*, 163.) It is called malice in law, because it is an inference which the law draws from the criminal nature of the act, but which may be rebutted by showing that there was no malicious intent to do an injury either to the individual or to the public. (*The King v. Lord Abingdon*, 1 *Esp.*, 228; 1 *Russ. on Crimes*, 250;

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Want's Case, *Sir Fr. Moore*, 627.) In the criminal prosecution it is necessary, therefore, to aver in the indictment that the words were published maliciously (*Anon., Styles R.*, 392), but in the civil action for damages this averment is not necessary. This was expressly adjudged upon error in *Mercer a. Sparks* (*Owen*, 51; and see *Sir Fr. Moore*, 459; *Noy*, 35), and though it is said in the report of that case that the averment was unnecessary, as the words were in themselves malicious, the reason given by the reporter is not the correct one, as it would apply equally to an indictment for libel, where such an averment is necessary. In the anonymous case cited from *Styles, Rolfe*, Ch. J., pointed out the distinction between the civil action and the criminal prosecution, declaring that it was not necessary to aver in a declaration that the words were published maliciously, though it was in an indictment or upon filing a criminal information. But although this has been settled to be the law for more than a hundred years, it has been the fashion with pleaders, both ancient and modern, as *Starkie* remarks, to deal so profusely with the evil motives of the defendant, that such an averment is rarely found wanting, and it is to this persistent and constant use of it that we owe the erroneous impression, that in all cases malice is, in some sense, the gist of the action. Thus in *Smith a. Richardson* (*Willis*, 24), four of the twelve judges were of opinion that malice was the gist of the action, because, as they expressed it, the words are always laid in the declaration to have been spoken falsely and maliciously; and Justice Bayley cites this opinion, without perceiving, or at least, without noticing, that the conclusion arrived at by the four judges was founded upon the mistaken impression that this averment in the declaration was a material one. In the adjustment of damages, malice may become an element. If nothing is shown in mitigation, the jury would be warranted in assuming that the publication was made with a malicious intent to injure, and evidence tending to show either the absence or the existence of malice is always received to diminish or to enlarge the damages. (*Gilman a. Lowell*, 8 *Wend.*, 573; *Root a. King*, 4 *Id.*, 139.) But it is an error to suppose that malice, except where the words are privileged, is in any way essential to a cause of action. If the words are averred in the complaint to have been published maliciously, the defendant cannot take issue upon that averment (*Fry a. Ben-*

net, 5 *Sandf.*, 62; Howard *a.* Sexton, 4 *Comst.*, 160); nor, except where the communication is privileged, will the most conclusive evidence of the absence of a malicious intent furnish any answer to the action, as it goes only to the question of damages. The motive of the defendant is wholly immaterial, as respects the right of action. It may be a good or a bad one. The defendant may have heard the slander from another, believed it to be true, have had very satisfactory reasons for so believing, and felt that it was his right, as well as his duty, to represent what he honestly supposed to be the plaintiff's true character; but all this goes only in mitigation of damages. Gilman *a.* Lowell, *supra*, affords a good illustration. The plaintiff had sworn in a cause that he was the owner of land, the deed of which was recorded in the clerk's office of a certain county. The defendant caused an official search to be made in the clerk's office, and the deed not being found, in consequence of a mistake in the indexing of the records, the clerk informed him that there was no such deed upon record, and the defendant, upon receiving this intelligence, accused the plaintiff of having sworn falsely. The plaintiff brought his action, and all this went only in mitigation of damages. The real foundation of the action is the right of the plaintiff to recover a pecuniary satisfaction for an injury sustained, and it is wholly immaterial what may have been the motive of the person who caused the injury. The act must be intentionally done, the meaning of which is, that the defendant should know what he published for; as in the case put by Starkie, if a servant should deliver a sealed letter containing the defamatory matter without knowing its contents, he would not, though the actual instrument of publication, be liable to an action. (Lamb's Case, 9 *Coke*, 59.) If the defendant knows what he publishes, the inference is, that he means that it shall have the effect of lessening the character of the plaintiff in the estimation of the community, for in the language of Lord Tenterden, in *The King a.* Harvey (2 *B. & Cres.*, 257), "he must be presumed to have intended to do that which the publication is calculated to bring about." This is a presumption of law from the act of publication. It is the only presumption which it is necessary to draw, and to denominate this intent malice, or malice in law, when it may have arisen from a good motive, the defendant believing what he

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alleges to be true, is to employ the word malice in a sense neither justified by its etymology, its ordinary meaning, nor its previous legal signification. To do so gives rise to confusion in respect to the meaning of the word, and involves the necessity of distinguishing two kinds of malice, whereas there is, and can be, in such an action, but one kind; for whether the existence of malice is presumed in the adjustment of damages from the absence of any thing in mitigation, or it is proved as a fact to enhance damages, or to maintain the action where the communication is privileged, it is generically the same thing in either case.

Where the occasion upon which the words were published was a privileged one, the existence of malice shows that the party was not acting in the discharge of a duty, or in the exercise of a right which the law, upon grounds of public policy, would otherwise presume to have been the fact. The protection which the occasion affords is founded upon the just and rational principle, that one who is not a volunteer, but whose duty or right it becomes to discuss or speak of the character of another, is not to be restrained by the fear of an action for defamation, but may freely declare what he honestly and truly believes. The law presumes that he did so, and upon that presumption exempts him from all liability, though what he said was unfounded in fact, and though its effect may have been highly detrimental; but the existence of malice removes this presumption, and places him upon the footing of a mischievous and malicious defamer.

Malice may be shown by the proof of extrinsic facts, or it may be inferable from the manner in which the publication was made, even though the subject-matter of the communication was relevant, and the occasion a privileged one. In *Wright v. Woodgate* (1 *Tyr. & Gr.*, 12), the letter written by the defendant was privileged, and all that was stated was pertinent to the subject-matter of the communication, which was to dissuade the person to whom it was written from giving his consent that another solicitor might be appointed for the plaintiff in place of the defendant. PARKE, B., said that the whole of the letter was a privileged communication; that the occasion of writing it rebutted the presumption of malice, and threw upon the plaintiff to show that there was malice, and that that might be made out by directing the attention of the jury to the lan-

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guage of the letter itself, or by proving by extrinsic evidence that the defendant entertained malicious feelings. So in the present case; though the occasion was one in which the defendant had a right fully to discuss the character of the plaintiff, and the fitness of requesting the architect to appoint him engineer, and though the charge made was relevant to the matter under discussion, still the way in which it was made, the broad statement by the defendant that he knew that the plaintiff was the author of the caricature, was going very far. It was an assumption of knowledge of the existence of what was asserted, precluding all doubt and forestalling all inquiry; and when it is taken in connection with what is averred in the complaint, that the plaintiff was not the author of the caricature, and was wholly guiltless of any complicity therein, I think it would be presumptively sufficient to entitle the jury to pass upon the question of malice. In *Roger a. Clifton* (3 *B. & P.*, 587), and in *Child a. Affert* (9 *B. & C.*, 403), which were cases of privileged communications, positive proof by the plaintiff that what was stated in the communication was false, would seem to have been regarded by the court as sufficient to raise the question whether the communication was made *bona fide* or not.

But independent of this, I am not aware that any thing more has ever been required in such cases than to aver generally, as has been done in this complaint, that the defamatory matter was published *ex malitia*. This is averring the fact substantively, and it cannot be necessary to set forth all the circumstances upon which the plaintiff means to rely to prove it. The usual mode of averring it is, that "contriving and maliciously intending to injure the character of the plaintiff, and to bring him into public scandal and disgrace, the defendant published," &c., "of and concerning the plaintiff," &c. This is the form given by the elementary writers, where the communication is privileged. (2 *Starkie on Slander*, 385; *Cooke on Defamation*, 311; *Chitty on Pleading*, 630, 6th Am. ed.) This was the averment used in *Rogers a. Clifton* (3 *Bos. & Pul.*, 587), and in *Pattison a. Jones* (8 *B. & C.*, 578). In analogous actions, where the proof of malice is essential to maintain the action, this general form of averring it has been considered sufficient. (*Barnadistone a. Some*, 2 *Lev.*, 114; *Mileward a. Seargeant*, referred to in note B to *Hermans a. Tappenden*, 1 *East*, 555.) And in my own expe-

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rience, a somewhat extensive one—for I have tried a great number of actions of this description, many of them contested by very able and experienced counsel—I do not remember a case where the pleader thought it necessary to set forth the facts and circumstances upon which he meant to rely to establish malice, or where any thing more was contained in the declaration than a general averment that the act was done maliciously.

The remaining point raised by the demurrer is, that the complaint should show, in respect to the publication, that there was a want of probable cause for making it. The want of probable cause, as essential to a right of action, arises only in cases for malicious prosecutions, or those actions for defamation which are analogous to them—a class of actions greatly discouraged (*Saville v. Roberts*, 1 *Ld. Ray*, 374; 12 *Mod.*, 208; 1 *Salk.*, 13), as it is to the public interest that all persons should be free to make complaints before the proper tribunals, of all matters affecting their own or the public interest, without being liable in damages if the charges made by them should turn out to be unfounded. The exemption extends to the complainant, and to all persons—judges, jurors, witnesses, attorneys, or public officers—who take part in the proceeding, and no action will lie for any injury to person, reputation, or property, growing out of it, unless it is shown that the party who originated and set it on foot had no reasonable or probable cause for so doing. Probable cause, in such a case, is a belief, founded upon a reasonable ground of suspicion of the truth of the charge made, and it is incumbent upon the party who brings such an action to aver and prove that there was a want of probable cause. It is generally a legitimate inference from the want of probable cause, that the party prosecuting was influenced by malice; but not absolutely so in all cases, as he may honestly believe in the truth of the charge he makes, but act upon insufficient grounds of suspicion, as in *Merman v. Mitchell* (13 *Maine*, 439), the rule being, that the circumstance which warrants a reasonable ground of suspicion must be such as would induce a cautious man to believe in the truth of the charge (*Mumns v. Nemours*, 3 *Wash. C. C.*, 37); while, again, proof of the most express malice will not support such an action, if there were probable cause, of which *Foshay v. Ferguson* (2 *Den.*, 617) is a striking example. The want of probable cause, therefore, may exist with or with-

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out malice, and as it is the foundation of the action, this ingredient essentially distinguishes it from an action brought for defamatory matter, maliciously published, upon a privileged occasion.

I am disposed to think that the present action, though in form an action for slander, is sufficiently analogous to demand the application of the rule that prevails in actions for malicious prosecution, and that proof of the want of probable cause is essential to sustain it. Howard *v.* Thompson (21 *Wend.*, 319) was an action for libel, in sending a written communication to the Secretary of the Treasury, accusing the plaintiff, who was a subordinate officer of the Secretary's department, of various acts of speculation and fraud upon the government, and requesting his removal; and, after mature consideration, it was held, that though in form an action for libel, it was essentially in principle like an action for a malicious prosecution, and that proof of the want of probable cause was necessary. If a person had sent a remonstrance to the Board of Commissioners against the employment of the plaintiff, containing the same charge which the defendant made before the Board, the remonstrant would have occupied a position similar to that of the defendant in Howard *v.* Thompson, and certainly the defendant in this case, for what was said by him at the deliberations of the Board, where he was acting in the capacity of a public officer, comes as fully within the reason of the rule.

The complaint here does not aver, in so many words, that there was a want of probable cause, but I think it sufficiently shows it. As before stated, it alleges that the plaintiff was not the author of the caricature, and had no complicity therein. This, I think, is all that the plaintiff should be required to prove in such a case, to make out *prima facie* the want of probable cause. In ordinary cases of prosecution, complaints, or petitions, whether made to judicial tribunals or to public officers, the party who institutes the proceeding necessarily lays before the body or officer the facts or circumstances upon which he rests his charge, to satisfy or convince the authority he addresses that a case exists demanding its interference or action. The accused is thus advised of what is relied upon to maintain the accusation against him, and may give such explanation of the circumstances, or submit such proof in connection with them, as

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will show that the defendant acted without reasonable ground of suspicion. But in this case, the defendant, before a public body of which he was a member, made a positive charge of a very grave nature against the plaintiff, without affording the slightest clue as to the facts or circumstances upon which he relied for the truth of his assertion. He stated that he knew that the plaintiff was the author of the caricature, without stating how or upon what his knowledge was founded; and all, I apprehend, that the accused party can do in such a case, is to go upon the stand and swear that he was not the author, and knew nothing about the making or publication of the caricature; and if, after such proof is submitted, the defendant can furnish no explanation of the grounds, facts, or reasons which induced him to make so positive a charge, the plain inference must be that he has none to offer, and that it was made without any cause whatever. Such a state of facts would, in my judgment, be ample evidence of want of probable cause. Judgment must, therefore, be given for the plaintiff, upon the demurrer.

METCALF *v.* STRYKER.

Supreme Court, Second District; General Term, 1859.

SHERIFF LIABLE AS BAIL.—DEFENCES.

A sheriff sued upon his liability as bail under section 201 of the Code, cannot avoid his liability by showing that the debtor, whom he arrested and discharged without sufficient bail to the action, was insolvent and had no property not exempt from execution, and had ever since remained in the same condition.*

* It is otherwise where the action is for an escape; as was held in the case of *DAGUERRE v. ORSER* (*New York Common Pleas; Special Term, March, 1859*).—The action was tried by the court, and the following finding and decision was rendered:

HILTON, J.—This action was tried before me without a jury, at a special term held in December, 1858.

On a motion during the progress of the cause made before Judge Brady for

*Affirmed,
31 ny. 255.*

*Affirmed,
15 Dec. 113.*

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Where bail that the sheriff has accepted fail to justify, the sheriff becomes liable as bail to the action, and his liability is commensurate with that of any other bail.

It seems, that it would be otherwise with the case of mere bail upon mesne process, or on surrender.

An action against the sheriff on his liability as bail to the action, is not an action for neglect of his official duty. The damages are the amount of the judgment, and are not subject of mitigation by evidence of the insolvency, &c., of the prisoner.

Exception directed to be heard in the first instance at general term.

The action was against the defendant, sheriff of the county of Kings, to recover upon his liability as bail under the provisions of the Code.

The allegations of the complaint were as follows :

The plaintiffs above named, by Benedict, Burr & Benedict, their attorneys, respectfully show to this court :

That at all the times hereinafter named they were co-partners, doing business in the city of New York, under the firm name of Metcalf & Duncan.

These plaintiffs, on information and belief, further allege, that the defendant, Burdett Stryker, was sheriff of the county of Kings at and from August 1, 1857, to December 31, 1857.

That an order of arrest, of which a copy is hereto annexed, marked Schedule B, was duly issued by the Honorable C. A.

leave to amend the complaint (see 3 *Abbotts' Pr. R.*, 86), he decided that the action was brought for an escape.

It will therefore be so considered for all the purposes of the trial.

In an action of such a character it has long been settled, that the *actual damage* sustained, not the debt or judgment recovered against the original debtor, forms the measure of damages. (*Crocker on Sheriffs*, &c., § 581 ; *Patterson v. Westervelt*, 17 *Wend.*, 543, and cases cited ; *Kellogg v. Munro*, 9 *Johns.*, 300 ; 2 *Rev. Stats.*, 4th ed., § 82.)

The evidence at the trial showed that Blagge, the original debtor, and against whom judgment had been obtained,—at the time he escaped from the custody of the defendant, by whom he had been taken, and was held under an order of arrest issued out of this court,—was insolvent ; and up to the time of his death at New Grenada, in September, 1855, his pecuniary circumstances continued unchanged.

The plaintiff, therefore, has sustained no actual injury by reason of the escape, and is only entitled to recover against the defendant nominal damages.

Judgment for plaintiff for six cents.

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Peabody, at that time a justice of the Supreme Court of the State of New York, to the said defendant, on or about the 15th day of August, 1857, in an action in said court, wherein said plaintiffs were plaintiffs, and one George C. Harriman was defendant, requiring the defendant in this action to arrest and hold to bail, in the sum of five thousand dollars, the said Harriman.

That thereupon said defendant arrested said Harriman, on or about the 20th day of August, 1857, and thereafter allowed the said Harriman to escape from his custody; and on or about the 25th day of August, the said defendant delivered to the plaintiffs' attorneys, by whom the order of arrest was subscribed or indorsed, a paper purporting to be a certified copy of an undertaking of the bail taken by him upon the discharge of the said Harriman from arrest, a copy of which is hereto annexed, marked Schedule A; but the same was not executed by two or more sufficient bail, and did not state their places of residence and occupations, according to law; and that on the next day—that is to say, on or about the 26th day of August, 1857—a notice was duly served on said defendant, that the plaintiffs did not accept the said bail, but that after the receipt of the said notice by the said defendant, neither the said defendant nor the said Harriman gave to the plaintiffs or their attorneys, by whom the said order of arrest was subscribed, notice of the justification of the same, or other bail, before a judge of the court or a county judge, at any specified time or place, nor any justification, or other notice of justification, as required by law.

That on the 12th day of August, 1858, the plaintiffs obtained judgment in said action against said Harriman for the sum of three thousand seven hundred and forty-three dollars and seventy-seven cents, and on the 13th day of August, 1858, caused to be filed a transcript of said judgment in the office of the clerk of King's county, and an execution to be duly issued to the then sheriff of King's county, upon said judgment against the property of said Harriman, which was thereafter returned by said sheriff wholly unsatisfied; and thereafter, and on the 27th day of August, 1858, an execution against the person of said Harriman was duly issued to the said sheriff, which has also been returned by the said sheriff, "defendant not found." That the

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said judgment has not been paid, nor any part thereof, but the same is still unpaid, not appealed from, modified, reversed, or discharged.

That the amount of said judgment and interest was duly demanded of said defendant, before the commencement of this action, and the payment of the same refused.

Wherefore the plaintiffs demand judgment against the defendant for the said sum of three thousand seven hundred and forty-three dollars and seventy-seven cents, and interest thereon from the 12th day of August, 1858, besides costs of this action.

BENEDICT, BURR & BENEDICT,
Plaintiffs' Attorneys.

The answer denied most of the allegations of the complaint.

The action was tried at a circuit court in the county of Kings, before Mr. Justice Lott and a jury, on the 29th day of March, 1859.

The plaintiffs, to prove the issues on their part, by Samuel Duncan, one of the plaintiffs, proved the copartnership stated in the complaint, and put in evidence a copy of a judgment-roll, by which they proved the judgment against George C. Harriman, as stated in the complaint. The plaintiffs also proved the issuing of the order of arrest, and the arrest of Harriman thereon, by the defendant, as alleged. They also gave in evidence the certified copy of the undertaking mentioned in the complaint, and proved that the same was delivered to the plaintiffs' attorneys, by whom the order of arrest was subscribed or indorsed, on the 25th day of August, 1857. The terms of the undertaking were, that George C. Harriman, the defendant, "shall at all times render himself amenable to the process of this court, during the pendency of this action, and to such as may be issued to enforce the judgment therein;" but the instrument did not state the occupations of the bail.

On the undertaking were indorsed the affidavits and certificate of acknowledgment.

The plaintiffs also proved that a notice that the plaintiffs did not accept the bail, was served upon the defendant, as stated in the complaint.

The defendant admitted that a transcript of the judgment against George C. Harriman, above-mentioned, was filed in

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the office of the clerk of Kings county, on the 13th day of August, 1858.

The plaintiffs also proved the issuing and return of the two executions, as stated in the complaint, and that the amount of the judgment was demanded of the defendant before the commencement of this action.

Thereupon they rested their case, and the defendant's counsel then offered to prove that George C. Harriman, at the time of his arrest by the defendant, and for a long time before, was, and ever since had been, utterly insolvent, and unable to pay the judgment, or any part thereof, and that he had no property, real or personal, at the time of his arrest, or for a long time before, or at any time since such arrest other than was exempt from execution. To this proof, the counsel for the plaintiffs objected, on the ground that it did not constitute a legal defence to the plaintiffs' action, and was not admissible in mitigation of the damages recoverable by the plaintiffs in this action. The court sustained the objection, and excluded the offered proof, to which decision of the court, the defendant's counsel excepted.

The interest on the judgment was admitted to be \$164.40. The defendant then rested, and the court thereupon instructed the jury, that the plaintiffs were entitled to recover the amount of the judgment, with interest, and directed the jury to render a verdict for the plaintiffs for \$3908.17. To which direction and charge, the defendant's counsel excepted.

The jury then rendered their verdict as directed; and the court thereupon ordered the exceptions to be heard in the first instance, at the general term, and that judgment in the mean time be suspended.

William W. Goodrich, for the plaintiffs.—I. The failure to serve notice of justification fixes the liability of the sheriff. (*Code*, § 201.) This liability is "the liability of bail." (*Code*, § 201; *Buckman v. Carnley*, 9 *How. Pr. R.*, 180.) This, by the undertaking, is that Harriman "shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce the judgment therein." This liability is not that of the old system, but the liability of bail under the Code, and from this the sheriff can *only* be exonerated in the manner provided by

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sections 191 and 201. (Buckman *a.* Carnley, 9 *How. Pr. R.*, 180.)

II. The liability of bail is the amount of the judgment against Harriman, with interest. Before the Code, insolvency of their principal was no defence to the bail. (3 *Petersd. Abr.*, 147, 167.) The jury must give their verdict for the whole debt. (Rawson *a.* Dole, 2 *Johns.*, 454; Porter *a.* Sayward, 7 *Mass.*, 377; Burrows *a.* Lowden, 8 *Ib.*, 373.) An insolvent discharge under the two-thirds act was a bar to the action against bail, *only* to avoid circuitry, and because the principal was not amenable to process. (Mechanics' Bank *a.* Hazard, 9 *Johns.*, 392; Kane *a.* Ingraham, 2 *Johns. C.*, 403.) There is a distinction between actions against the sheriff and those against bail. The Revised Statutes limited the liability of the sheriff, but not that of bail, to "extent of damages sustained." (2 *Rev. Stats.*, 437, § 62.) All the reported cases are founded upon the Revised Statutes. The liability of bail sought to be enforced here is altogether different.

III. If evidence of insolvency should be admitted, then insolvency exempts a person from the operations of the provisions of the Code as to arrest and bail. This *reductio ad absurdum* of the argument of the defence shows its fallacy.

J. M. Pray, for the defendant.—I. The court erred in excluding the testimony offered by the defendant to prove the insolvency of George C. Harriman. 1. The plaintiffs claim to recover on the ground that the defendant "allowed the said Harriman to escape from his custody," and the insolvency of the prisoner may be given in evidence, in mitigation of damages in action, for escape from arrest on mesne process, or other omissions of duty, unless prohibited by statute. (*Sedgw. on Damages*, 1st ed., 506–512, and cases therein cited; Potter *a.* Lansing, 1 *Johns.*, 215; Russell *a.* Turner, 7 *Ib.*, 189; Patterson *a.* Westervelt, 17 *Wend.*, 543; Rawson *a.* Dole, 2 *Johns.*, 454; Van Slyck *a.* Hogeboom, 6 *Ib.*, 270; Kellogg *a.* Munro, 9 *Ib.*, 300; Latham *a.* Westervelt, sheriff, &c., 26 *Barb.*, 256; Humphrey *a.* Hathorn, 24 *Barb.*, 278; 9 *Metc.*, 564.)

II. The defendant acted in good faith, in letting Harriman to bail, as stated in the complaint, and was bound so to let him to bail. (*Code*, § 186; Richards *a.* Porter, 7 *Johns.*, 137.)

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III. The omission of the defendant to give notice of justification of bail, was at most a neglect of duty, for which the plaintiff cannot recover more than he has lost by such neglect; and the defendant may, in all cases of mere neglect of duty, prove the insolvency of the party for whom he is sought to be made liable, in mitigation of damages. (*Bank of Rome a. Curtis*, 1 *Hill*, 275; *Pardee a. Robertson*, 6 *Ib.*, 550; *Ledyard a. Jones*, 3 *Seld.*, 550.)

IV. The defendant, if liable to the plaintiff, is only liable as bail for a defendant in custody on mesne process, and as such may prove the insolvency of Harriman, in mitigation of damages. (*Code*, §§ 201, 190, 276; *Kellogg a. Munro*, 9 *Johns.*, 300; *Dele a. Moulter*, 2 *Johns. Cas.*, 205; 2 *Ib.*, 406; 4 *Johns.*, 189 and 213.)

V. The undertaking required by the Code (§ 187) is, in its nature and effect, the same as a bond for the performance of covenants, under which the actual damages sustained, and no more, can be recovered. (*Code*, §§ 180, 181, 182, 203, and sections above cited; 2 *Rev. Stats.*, 3d ed., 530, &c., §§ 58, 54, 60, 62, 65, 66, 72, 74, 76; 1 *Rev. Laws of 1813*, 423, § 13, 425, § 19, 426, § 21, 429, §§ 6, 7, 430, § 9.)

VI. It was not intended by the Code to change or vary the liability of the defendant to the plaintiff in this case, for any matter stated in the complaint, otherwise than to provide, as in section 190, that bail shall be proceeded against by action only; and section 276 limits the amount of recovery to the same rate of damages as might have been heretofore recovered for the same cause of action.

VII. The bond required by the Revised Statutes to be given for the liberties of the jail (with which the Code has not interfered), is the same in substance and effect as the undertaking of bail required by the Code upon an order of arrest; and in case of a breach of such bond, the plaintiff, upon whose process the party bailed was in custody, could only recover of the sheriff, or of the bail, his actual damages, if the prisoner was in custody on mesne process; nor could he recover any more if the prisoner was in custody upon execution, except by the statute, which gives him the amount required to be made by the execution, and thus shuts out all testimony in mitigation. (2 *Rev. Stats.*, 533, § 80, 3d ed., § 62, 1st ed., 437.)

VIII. The court erred in instructing the jury as to the amount which the plaintiffs were entitled to recover.

BY THE COURT.—EMMOTT, J.—The radical fault of the argument for the defendant in this case is, that it treats the action as if it were brought for an escape, or a negligent or wilful breach of duty by the sheriff. There may be some color given to this view by some of the allegations in the complaint, but the liability of the defendant does not rest upon such a foundation. His liability is that of bail to the action, which is cast upon him, in circumstances like the present, by section 201 of the Code of Procedure.

It appeared upon the trial of this cause, at the circuit, that the plaintiffs commenced an action in this court against one George C. Harriman, and obtained an order of arrest, which was delivered to the defendant, then sheriff of Kings county, on or about August 15, 1857. The defendant arrested Harriman pursuant to this order, and held him in custody until he gave bail. On the 20th of August, an undertaking was executed by three sureties on his behalf, pursuant to section 187 of the Code, except that the bail did not state their occupations; and thereupon the sheriff discharged him from custody. On the 25th of August, the sheriff served a copy of the undertaking upon the attorneys for the plaintiffs in that action. The next day—*i. e.*, the 26th of August—the plaintiffs' attorneys gave the sheriff notice that the bail was not accepted. The bail did not justify, nor was any notice of justification served, and no new bail was given; but the action proceeded to judgment, and the plaintiffs recovered, in August, 1858, \$3743.77 of Harriman. A transcript was filed in the county of Kings, and an execution against property issued to the sheriff of that county, which was returned unsatisfied. Then an execution against the body of the defendant was issued, and that also was returned, that he could not be found.

It was conceded on the trial, as it was also upon the argument, that the defendant was liable; but the question is, what is the extent and measure of his liability? After the plaintiffs had rested at the trial, the defendant's counsel offered to prove that George C. Harriman, at the time of his arrest, was insolvent, and had no property not exempt from execution, and had ever since remained in the same condition. The judge rejected the evi-

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dence, and the defendant's counsel excepted, and thereupon a verdict was taken for the plaintiffs, by the direction of the court, for the amount of the judgment against Harriman, with interest, the defendant's counsel also excepting to such direction.

Section 201 of the Code enacts that, in such a case as this—that is, where, after the defendant is arrested, his bail is not justified—the sheriff himself shall be liable as bail. The next section (202) provides for the enforcement of the sheriff's liability as bail, by prosecuting his official bond, when a judgment has been recovered against him upon such liability, and an execution thereon returned unsatisfied. And section 203 makes the bail taken upon arrest, when they do not justify, liable to the sheriff for all damages which he may sustain by their omission. Thus the three sections together impose upon the sheriff a liability in a given case, provide for its enforcement, and then for his protection, or indemnity by the bail whom he has accepted.

It is plain enough that in the case we are considering, the defendant became liable in the same manner and to the same extent as bail to the action would have been, if such bail had been given and perfected. Thus the inquiry is reduced to the question, what is the liability of bail, under the Code, in such a case as the present?

The Code itself furnishes no answer to this question, and the undertaking which is substituted for the bail-bond of the old practice is no more explicit in this respect than the latter. The bail agree, in this undertaking, that the defendant shall at all times render himself amenable to the process of this court during the pendency of the action, and to such as may be issued to enforce the judgment thereon. In the present case, the Code cast this undertaking upon the sheriff, and his undertaking was forfeited, inasmuch as the defendant in that action was not amenable to the process issued to enforce the judgment, and the execution issued against his body was returned, "not found." But neither the undertaking nor the Code inform us what is to be the consequence, or the extent of the penalty incurred. We must, therefore, resort to the former practice of the courts, and the former legislation of the State, to assist our investigation. We are justified in this resort by section 276 of the Code, declaring that in all actions for damages the recovery shall be at the same rate as might have heretofore been recovered, if that section be

applicable to the present action, which I very much doubt; but we are justified by the sheer necessity of the case, if it be not. In the multiplied questions growing out of the Code of Procedure with which the courts are continually vexed, they would often be entirely at sea, if they did not act upon their own knowledge of the previous law, and also presume, with a distinguished judge of our highest court in a famous case, that the authors of the Code had some knowledge of what the law and the practice was, and acted upon it.

It must not be forgotten that this is not an action for a neglect of duty by the sheriff, as, for instance, in not returning an execution, or otherwise. There would have been actions on the case before the Code destroyed our nomenclature. The plaintiff, in all such actions, recovered *damages*, of which the amount of the judgment was the measure, *prima facie*, but subject to be mitigated in certain circumstances.

The Bank of Rome *v.* Carters (1 *Hill*, 275), and Pardee *v.* Robertson (6 *Ib.*, 550), are instances of this class of actions under the former practice, in the latter of which Judge Cowen traces the history of the then existing mode of procedure. So, under the present system, Humphrey *v.* Hathorn, (24 *Barb.*, 278), and Ledyard *v.* Jones (3 *Seld.*, 550), are cases in which the same rule of damages observed under the former practice, was applied. Neither of these cases is parallel to the present.

Nor can we, strictly or properly, consider this as an action for an escape, or to be determined by the rules which have been applied to such cases. If the undertaking given on behalf of the defendant Harriman in the original action, which was accepted by the present defendant, and upon which he discharged his prisoner, was not in conformity to the requisition of the statute, which seems to have been the case, then it would seem that Harriman's discharge was an escape, for which the defendant was liable. It is, however, unnecessary to determine whether this was so, or what would be the sheriff's liability in consequence, since that is not the ground of the present action. If an action had been brought forthwith upon such discharge, for an escape from mesne process, the rule of damages would have been different from what we understand it to be now. But the defendant's liability was fixed by the failure of Harriman's bail to justify, and that liability was the same, whether the undertaking

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were or were not in conformity to the statute. That question, and the extent of the sheriff's liability for an escape, may be passed over. They are not the points now before us.

Still it may be observed, that there is an analogy between actions for escapes, and actions upon bail-bonds. It was well settled under the law, before the Code, that in an action for an escape from final process, the plaintiff recovered the amount of the original judgment, while for an escape from mesne process he could only recover his actual damages. In the former class of cases, therefore—that is, when the defendant was charged in execution—the action was *debt*, while in the latter it was *case*. (See, to this effect, *Ransom a. Dole*, 2 *Johns.*, 454; *Patton a. Lansing*, 1 *Ib.*, 215; *Russell a. Turner*, 9 *Ib.*, 189; *Patterson a. Westervelt*, 17 *Wend.*, 543.) See also *Van Slyck a. Hogeboom*, (6 *Johns.*, 270), in which the distinction between the two classes of actions is clearly defined. *Kellogg a. Munro* (9 *Ib.*, 9) was a suit upon a bond given for jail liberties, and although brought after judgment, was, in effect, for an escape from mesne process. The defendant had been in custody on mesne process, was surrendered by his bail, and was thereupon admitted to the liberties, and no execution was proved.

We were referred upon the argument, by the defendant's counsel, to the provisions of the Revised Statutes in relation to bonds for the jail liberties and suits thereon. (2 *Rev. Stats.*, 433 and seq.) But the liability of the bail to the action under the Code is not the same with that of the bail given for the limits. The bond for the jail liberties may be given either before or after judgment, when the defendant is held either on mesne or final process, and its effect is varied accordingly. If it be given for his discharge from mesne process, or upon his surrender by his bail on such process, then the liability of the bail extends only to the actual loss sustained by the plaintiffs, as the liability of the sheriff for an escape from mesne process is limited to the actual damage. But if the prisoner was held by an execution, then his bail for the jail liberties must pay the judgment, if he commits a breach of the bond.

In all these cases, the bail who undertake that their principal shall be amenable to final process, were held to pay the amount of his debt if he was not, and the sheriff who suffers an escape from final process, is held to the same liability.

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Now it is very true that the undertaking given for Harriman, the place of which was taken by the sheriff, was given upon an arrest upon mesne process. But it was not merely bail upon an arrest, nor was it bail for the jail liberties, it was bail to the action—to the same effect as special bail under the former practice. The liability of the bail in such an undertaking, and the consequent liability of the sheriff in the present case, continues through the whole course of the action. It varies with the several stages of the cause, and its ultimate extent is not determined until judgment is recovered, and all the remedies upon it exhausted against the principal. It may be terminated at any time by the surrender of the principal by his bail before judgment, or after it, or even after suit upon the original undertaking. The sheriff possesses the same power to surrender the defendant after he has become substituted as his bail, by the failure of the latter to justify. (Buckman *v.* Carnley, 9 *Pr. R.*, 180.) Unless, however, such a surrender is made, the liability of the bail continues upon the same undertaking, and after judgment and execution is limited only by the amount of the judgment against the principal.

We can see no escape from the conclusions that the sheriff, in the present case, incurred the liability of bail to the action; that this suit is properly brought upon this liability; that if there had been an action against the bail, in an undertaking which had been accepted or had been justified, the recovery must have been the full amount of the original judgment and interest; and that, therefore, the present defendant was liable to the same extent. As soon as we determine that the liability of the sheriff is that of bail, and the present action is brought against him as in effect made bail by this statute, and not for negligence or an escape, it must be seen that these consequences are inevitable. If it were otherwise, the provisions of the Code as to arrest and bail would be rendered entirely nugatory. We cannot apply any rule to the liability of the present defendant, which will not also be applicable to that of the sureties in the undertaking of bail, when perfected. Whatever will exonerate the sheriff, or mitigate recovery against him, must have the same effect in cases where they are sued. The result is, that we are asked by defendant's counsel to hold that, whenever a defendant who has been arrested is insolvent—which may sometimes be the very

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reason of his arrest, if not its cause—his bail are absolved from all responsibility, except from nominal damages. If that were the law, the only persons whose arrest would be of any avail, would be those whose arrest is altogether unnecessary, to provide for the enforcement of the law or its judgments. The law, previous to the Code, was guilty of no such absurdity, and as the present statute neither alters nor declares the rule, we are not at liberty to impute such consequences to it.

As the defendant's liability was therefore fixed by the original judgment, evidence of the insolvency of the judgment-debtor was immaterial, and was properly rejected. The direction given to the jury was correct, and judgment must be ordered for the plaintiff upon the verdict, with costs.

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Supreme Court, Sixth District; General Term, October, 1859.

USURY.—INDORSERS FOR CORPORATIONS.

The act of 1850 (*Laws of 1850, §44*)—prohibiting corporations from interposing the defence of usury—does not affect the contract in respect to other parties; but merely precludes the corporation and those in privity with them from avoiding it.

An accommodation indorser of usurious negotiable paper made by a corporation, may interpose the defence of usury.

Appeal from a judgment rendered on a trial by the court.

The decision below will be found reported 9 *Ante*, 124, where the facts are fully stated. From that judgment the defendants appealed to the general term.

BY THE COURT.*—W. F. ALLEN, J.—The plaintiff loaned to the Potsdam and Watertown Railroad Company money at a

* Present, W. F. ALLEN, PRATT, BALCOM, and MULLEN, JJ.

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greater rate of interest than that allowed by law, and to secure the repayment of the money so loaned with the illegal interest, the note in suit was given, the individual defendants indorsing as the sureties, and for the accommodation of the Railroad Company, the maker of the note. Judgment at the circuit was given against the indorsers, upon the ground that they were estopped by the "Act to prohibit corporations from interposing the defence of usury in any action," passed, April 6, 1850, from alleging usury as a defence to this action.

The defendants are in no sense strangers to the contract of loan, so as to preclude them from setting up the defence of usury when sued upon their indorsement, or from seeking affirmative relief by action on the ground of usury. They are sureties of the borrower, and as such are embraced in the term "borrower," as used in the eighth section of the Revised Statutes relating to usury, and in the fourth section of the usury law of 1837. (3 *Rev. Stats.*, 5th ed., 73, §§ 8, 74, 13; *Post a.* Bank of Utica, 7 *Hill*, 391; *Cole a. Sanger*, 10 *Paige*, 583; *Mun a. Hovey*, 9 *Ib.*, 197.) A mere stranger to the transaction cannot ordinarily allege usury in respect to it; but a party to a deed or contract, as well as those standing in legal parity with him, can, unless estopped or under disability of some kind, always show it to be void when it is sought to be enforced against him. The defendants are not certainly strangers to their own contract of indorsement. They, and they only, can allege the invalidity of their contract. (*Dix a. Van Wyck*, 2 *Hill*, 522; *Green a. Moore*, 4 *Barb.*, 332.) They are not necessarily restricted, by their relation to the principal, to the defences which may be made available to the maker of the note.

They are not joint contractors with the maker, and the contracts of the maker and indorsers are entirely distinct, and governed by different rules. The contract of the one is conditional, while that of the other is absolute. An action against an indorser may be defeated by want of demand and notice, by dealing with the principal debtor to his prejudice when he occupies the position of a surety; and an indorsement may be void as obtained by fraud, or for some other reason while the contract of the maker is valid. So too one party to a note (maker, or indorser), may be estopped by his own acts from setting up a defence true in fact and common to both, and which would be

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fatal, while the other parties may avail themselves of it. (McKnight *a.* Wheeler, 6 *Hill*, 492; Holmes *a.* Williams, 10 *Paige*, 326; 3 *Kern.*, 316, per DENIO, J.; Chamberlain *a.* Townsend, 26 *Barb.*, 611; Dane *a.* Schutt, 2 *Duer*, 621; Clark *a.* Sessions, 4 *Ib.*, 408; Prescott *a.* Davis, 4 *Barb.*, 495.)

As one party may be estopped by his own acts from setting up a defence, so he may be estopped by act and operation of law, or by a statute describing him by name, or by his status or condition, or as a contractor in a particular form without affecting the parties not named. The contracts of makers and indorsers of promissory notes are treated, as they are in truth, as separate and several contracts. They may or may not be supported by the same consideration, but a joint-action will not lie against them, although they may now by statute be sued together, but in such case the action is regarded for all the purposes of protecting the rights of parties, and is prosecuted as a several action against the several parties. The validity of the contract of indorsement does not necessarily depend upon the validity of the engagement of the maker. It is true where both grow out of the same transaction, and depend upon the same consideration, if one is illegal both are necessarily so; but it does not follow that because one is not in a situation to allege the illegality, the other shall be precluded. The law which prohibits the borrower in this case to allege usury is very direct in its terms, and simple in its provisions. "No corporation shall hereafter interpose the defence of usury." Assignees and representatives of corporations, although not named, are within the spirit of the act, and therefore within its terms, and they are not permitted to avail themselves of a defence from which the corporations are excluded. (Curtiss *a.* Leavitt, 15 *N. Y. R.*, 296, point 8.)

Whether under all circumstances creditors and others claiming under a corporation should be within the prohibition is not settled, and is not free from doubt, but need not be considered here. So too, although the letter of the act merely forbids corporations from interposing the defence of usury, it has been very properly held that it necessarily takes from the corporation the right to assert the usury in any way—defensively, and in any way to vacate or set aside a contract, as well by affirmative action as by way of a defence to an action on the contract. It takes from the corporation the objection of usury. (Butterworth

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a. O'Brien, 28 *Barb.*, 187.) This being so, the language used by the learned judge of the Court of Appeals in *Curtiss a. Leavitt*, was appropriate and expressive. The undertaking of a corporation founded upon a usurious consideration is, *quoad* the corporation and its receiver or assignee, as if no statute of usury existed. A statute is as no statute to one who is prohibited to use or claim the benefit of it. It is as a repealed statute to him. His rights are not affected by it. Judge Comstock says (p. 85): "My impression is that the act must be construed as a repeal of the statutes of usury, as to all contracts of corporations stipulating to pay interest," &c.

This is doubtless true, but that does not extend necessarily to collateral contracts of others. Here we have the agreement for a loan usurious in itself, consummated by the borrower—and the absolute promise or contract of the corporation to pay, as to which it is said, and need not be decided, the statute of usury is repealed, and the collateral and conditional contract of the sureties, as to whom the statute of usury is in full force. Judge Burrows (p. 154) better expresses my idea of the effect and operation of the statute, and refers to it as operating upon the condition of the artificial beings named, and thus as to their incidentally affecting the contract, he says: "The condition of this class of beings becomes the same as if the usury laws never existed." The statute operates directly upon the person, and only indirectly and incidentally upon the contract. Construction has no place in respect to a statute or other instrument which is perfectly plain and easy to be understood, giving the words their ordinary and usual signification. The statute was passed under the pressure of the case of the Dry Dock Bank *a.* The American Life Insurance and Trust Company, in which the plaintiff was exempted from the payment of a very large sum of money, loaned under a contract held to be usurious (3 *Comst.*, 344), and was not designed especially to give moneyed corporations the advantage over needy individuals competing for loans in the money market.

It may have had that effect, but such was not its primary object; which was to hold corporations to their engagements irrespective of the general policy of the usury laws as affecting the contracts of individuals. The language chosen is well calculated to carry out the primary object of the act, and is not so

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general as to interfere with the usury laws or to affect individuals. If the statute of 1850, by implication repeals the usury laws, so far as contracts for loans to corporations are concerned, as is claimed, then a repeal of that act would not so restore the usury laws as to invalidate contracts made during its existence, by bringing them within the penalty imposed by the usury laws. A repeal of the act could not affect the contract, and yet my impression is that a repeal of that act would place all contracts of corporations on the same footing with contracts made by individuals. The statute would preclude a corporation surety from interposing the defence of usury, although the individual and principal debtor not within the act would not be estopped. It certainly cannot be claimed that all parties to a promissory note or bill of exchange, in which the name of a corporation is found as maker, drawer, indorser, or acceptor, are by the act of 1850 debarred from the protection of the statutes of usury.

It is supposed that there is some mysterious connection between the contracts of the maker and indorsers by means of the loan which constitutes the consideration of both, by which the disabilities of the maker are transferred to the indorsers. But I am unable to see by what process. If the Legislature had said, as they might, that the statutes of usury should not apply to contracts for the loan or forbearance of money to corporations, the case would be different, and the plaintiff's counsel would be right; but it is not so written, and we are not permitted to go beyond the statute. If such had been the substance of the act, then it would not have affected the liability of corporations upon contracts made in other States, and void by the usury laws of those States. Our statutes could not repeal foreign statutes, and they could have been pleaded in our courts.

But the statute does, in truth, as intended, said Judge Comstock in *Curtiss v. Leavitt*, prohibit corporations from interposing in our courts the usury laws of other States and countries as a defence to their contracts; which shows that the statute operates not by way of a repeal of our statutes of usury, but simply upon the ground that the prohibition is personal. I do not suppose that it would make any difference if the action was against the defendants as joint borrowers with the railroad corporation, and upon a joint contract. But it is not so, and the contracts are as independent as if written on separate pieces of paper. Sup-

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pose the defendants had loaned their note to the Railroad Company, payable to bearer, and the company without indorsement had sold it for less than its face, so that it would have been void for usury; would the fact that the loan was made to a corporation bring the parties to the note within the provisions of the act of 1850, and exclude them from the benefit of the usury laws?

Certainly not, as I think—and if not—then the fact that the corporation indorsed the note would not affect the makers, and to go one step farther, the fact that the corporation borrowed the indorsement rather than the note of the individuals, would not vary the rights of the parties. The statute is (3 *Rev. Stats.*, 5th ed., 73, § 5): “All bonds, bills, notes, assurances, conveyances, all other contracts and securities whatsoever, &c., whereupon or whereby there shall be reserved or taken a greater sum or value for the loan, or forbearance of any money, &c., than is prescribed by statute, shall be void.”

An indorsement by way of security is within the provision.

The note and indorsement received vitality by the transfer to secure the loan, and depend upon it for a consideration; and if that is illegal, the contract fails. It is no answer to the plea of usury when interposed by the indorser, to say that the maker is estopped, or by law precluded from alleging the defence. When the maker interposes the defence, the estoppel may be replied.

It is as to the contract of the corporation that the statute of usury is *quasi* repealed, not as to the contract of the individual indorser. It is only by a construction not warranted by the language of the act, nor required by any necessity, nor necessary to give full effect to the statute and the intent of the Legislature as expressed in it, that it can be claimed that the loan to a corporation, and all securities connected with it, are made valid by being taken out of the operation of the statutes of usury by the act of 1850, and I am not prepared to go that length.

We are cited to two cases, *Bork a. Seaman* (24 *Penn. State R.*, 435), and *The Market Bank of Troy a. Smith*, decided by the United States District Court for Wisconsin, and reported in the *American Law Register* for September, 1859, in which the same construction was given to the statute, and with the reasoning I am entirely satisfied. Perhaps a shorter answer to the defence interposed in those States would have been, that the

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laws of this State affecting the remedy had no extra-territorial force, and such would have been consistent with the view taken of the statute.

I think the learned justice erred in his application of the statute at the circuit, and that the judgment must be reversed, and a new trial granted, costs to abide the event.

THE PEOPLE *v.* FRANCISCO.

Supreme Court, First District; General Term, November, 1858.

PENAL STATUTE.—PILOTAGE.

The pilot of a steam-tug or steam tow-boat, who, being upon his own boat, tows a vessel through Hell Gate, and by signals made to the helmsman of the vessel in tow, directs changes at the helm, to conform to the movements of the steamer, does not pilot such vessel within the prohibition of the act of 1847 (*Laws of 1847, ch. 69*), relative to Hell Gate pilots.

Of the proper terms of a charge to the jury in trial of a defendant for violation of that statute.

Appeal from the New York General Sessions.

The appellant was indicted in the General Sessions, and convicted of a misdemeanor in violating the provisions of chapter 69 of the Laws of 1847, relating to the Hell Gate pilots.

That act provides that there shall be appointed by the governor and Senate fit and proper persons to act as pilots for the safe pilotage of vessels through the channel of the East River, commonly called Hell Gate. The act provides for compensation for such service, and also provides that any pilot who shall first tender his services to any vessel passing through the Gate, and whose services shall not be accepted, shall be entitled to demand and receive half pilotage.

The act further provides that if any person other than a Hell Gate pilot shall pilot for any other person any vessel of any description through the channel of the East River, commonly called Hell Gate, he shall forfeit and pay the sum of \$30 for

each offence, or on conviction thereof shall be deemed guilty of a misdemeanor, and shall be punished as such, and the act also declares that it shall not be construed as applying to steamboats.

The defendant was the pilot of the steam-tug H. Minturn, which was used as such in the harbor of New York; on the 7th of May, 1857, the two schooners called the George and Humming Bird were lashed to the steam-tug Minturn, one on each side, and thus taken through Hell Gate by the defendant, he being on board the steamboat and piloting it, and making signals to those on board the schooners to change their helms to conform to the movements of the steamer.

D. McMahon, for the appellant.—The court should have charged, as requested, that the act of defendant was a towage service, and not a violation of the Pilot Laws. 1. Piloting is the act of intelligently guiding a vessel *while on board of it*. (*Bouv. Law. Dict.*, tit. *Pilots*. 2. In performing the service of towage, the Minturn was the agent of the two canvasses. (*Creole and Sampson*, 2 *Wallace Jr. R.*, 512.) If so, the entire mass was as one vessel, or rather the act of towage was the act of furnishing by the appellant of a breeze of wind (*i. e.*, motive power) to the two canvasses. Then the case stood thus, viz.: That the canvasses thought fit to do their own pilotage, which they had a right to do on paying half pilotage. (1 *Laws of* 1847, 78, § 7.) In this case the two canvasses paid on demand the half pilotage, and the prosecutors thereby are not affected in any way. 3. The act of towage is not *per se* a violation of the pilot laws. (See *Laws of* 1857, 501, ch. 243, § 29.)

John McKean, for the people, respondents.

BY THE COURT.*—DAVIES, P. J.—The duties of the pilots authorized by the act to be appointed and to act as pilots for the safe pilotage of vessels through the channel commonly called Hell Gate, are prescribed by law; and any person not such pilot, who shall pilot any vessel, is made subject to the

* Present, DAVIES, P. J., SUTHERLAND and HOGEBOM, JJ.

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penalties of the act. *Bouvier's Law Dict.*, vol. 2, p. 337, defines a pilot to be, first, an officer serving on board of a ship during the course of a voyage, and having the charge of the helm and of the ship's route; and secondly, an officer authorized by law who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port.

This definition would seem to carry the idea that the pilot is to be on board the ship piloted—that he is not in the legal sense a pilot unless on board the ship which he is conducting through a river or channel. Could he be said to be a pilot if he stood on the shore and directed the course of the vessel by signals, or ran along the banks of the stream and by words or signs controlled and directed the course of the vessel navigating the stream? We think not, and that the intendment of the act was to apply to pilots on board, piloting and directing the ship or vessel while on board of it. The defendant was conducting the steam-tug through the channel of the East River, as he lawfully might do. The two schooners which it is claimed he piloted were lashed to the steamboat, and must necessarily obey its every motion. As a consequence, they were piloted through the channel, and so they would have been if placed on the deck of the steamer. It is true the persons on the schooners had to obey and did obey signals given to them by the defendant while on board the steamer. He might have given the same if on the land, but we do not see that this circumstance determines that he was piloting the schooners.

We have not seen any decision of our courts upon the proper construction to be given to this statute, upon the point now presented for consideration. But a case has been decided by the English Court of Exchequer, upon a similar statute, which seems to us of high authority and quite controlling. The language of the English statute is (6 *Geo. IV.*, ch. 125, § 70): "Every person assuming or continuing to act *in the charge or conduct of any ship or vessel*, without being a licensed pilot, after any licensed pilot shall have offered to take charge of such ship or vessel, shall forfeit," &c.

It will be seen that the language of this statute is more comprehensive than ours, and is not so technical in the terms used. Ours is "to pilot," or "piloting;" theirs, "to act in the charge

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or conduct of any ship or vessel." *Reily v. Scott* (7 *Wilson & Welsby's R.*, 93) was an action to recover a penalty incurred under this statute, for doing an act like that for which the defendant in this case has been convicted of a misdemeanor.

Baron Parke, in delivering the opinion of the court, says: "The first question arising in this case is, whether the defendant had charge of the ship within the meaning of the pilot act. We are of the opinion that he had not. These words are to be understood in the sense ascribed to them in other parts of the act; that is, they mean the taking charge and direction *as a pilot*, whose appropriate and, indeed, sole duty, is to select the course and take the management and conduct of the vessel for the purpose of directing her in that course. The master of a coasting vessel may, if he pleases, perform that duty himself, but if he chooses to employ another for that purpose he must employ a licensed pilot, and an unlicensed person taking that duty on himself by command of the master, when a licensed pilot offers his services, would be liable to the penalty in section 70.

But the master is not precluded from employing any moving power which he may please; he may make use of another vessel or boat, or steam-tug for that purpose, and if that cannot be done without necessarily devolving upon those who may apply the power, the selection of the course and a certain position, or, indeed, all the charge and conduct of the vessel in that course, still, if the *bona-fide* object of the employment be the moving power, the person so employed is not a pilot, and has not the conduct and charge of the vessel as such within the meaning of the act. If, indeed, the real object in any case should appear to be to obtain the assistance of the skill of a pilot, and to give him the charge and conduct of the vessel under some colorable duty then assigned to him, the case would be within the act; but in the present instance it is expressly found that the steam-tug was *bona-fide* hired for the purpose of conducting the vessel into the river, and the court in that case hold that no penalty was incurred.

It was assumed on the trial of the defendant that he was engaged in the business of towage. If not, the fifth and sixth requests of the defendant to the judge raised the question, and brought the case within that in the English Exchequer. The

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fifth request was that if the jury believed that the act done by the defendant on this occasion was of towage only, the defendant must be acquitted, for that offence was not contemplated by the act, and the judge charged, with this qualification, that if the defendant directed and controlled the movements of the steamer, and was the controlling spirit, then his act is one of pilotage. To this the defendant excepted; and in holding that the defendant while controlling the movements of the tug, and its master-spirit, was committing an act of pilotage, we think the learned recorder erred. So also we think he erred in refusing to charge that the steam-tug Minturn, being a steamboat propelled by steam, had a right to tow vessels through Hell Gate, without being subject to the laws relating to pilotage, and that by section 10 of the act of 1847, steamboats were excepted from its operation. We think that upon the facts proved, the defendant has not been guilty of any offence under the act of 1847, and that there was error in refusing to charge in the particulars mentioned as requested, and that consequently the conviction must be reversed.

Judgment against the people.

THE N. Y. ICE COMPANY *v.* THE NORTHWESTERN INSURANCE COMPANY.

Supreme Court, First District; Special Term, January, 1860.

MODE OF TRIAL.—EQUITABLE RELIEF.—REFORMATION OF CON- TRACT.

If the plaintiffs seek to recover damages, and ask equitable relief, merely incidental to the recovery of damages,—*e. g.*, the reformation of the contract sued on,—and ask such relief only in case it should be necessary as a preliminary to the recovery of damages, they cannot, after first trying the cause as an equity cause before the court without a jury, and failing to sustain their right to the equitable relief, have a subsequent trial of their right to recover, independent of such relief.

The proper course in such case is to dismiss the complaint, without prejudice to a new action.

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It seems, that where the main object of the action is a recovery of damages on a cause of action which would formerly have been a common-law action, and equitable relief is sought merely in aid of such recovery, it it should be adjudged necessary, the cause should be tried at the circuit, and not at a special term.

Equity does not relieve against a contract on the ground of mistake, except where the mistake is in the instrument, so that it can be reformed to express the true intention of both parties. A misunderstanding of the parties, by which there was a want of concurrence of minds upon the conditions of the contract, but without mistake in the instrument, is not matter of relief.

Trial by the court.

The facts of the case are fully stated in the opinion.

INGRAHAM, J.—The plaintiffs brought their action against the defendants on a policy of insurance against loss by fire. In the complaint, they averred their claim on the policy for the loss, and they also averred facts from which they claimed that an error had occurred in the making out of the policy of insurance, and they demanded judgment against the defendant for the amount of the loss, and in case it should be necessary to the recovery, that the policy should be reformed and corrected, for a further judgment, as might be necessary.

It is apparent that both legal and equitable relief is prayed for in this complaint, although the main cause of action is to recover for the loss, and the equitable relief is merely sought for, if it shall be found necessary for the plaintiffs' recovery. The equitable relief was to reform the policy, by correcting the alleged mistake.

It appears to me that this cause should have gone to the circuit for trial. There the plaintiffs could have tried their action to recover for the loss before a jury, and as both the legal and equitable relief is prayed for, the judge holding that court could have granted such relief, and then submitted the other questions to the jury.

But the parties have seen fit to bring the cause on for trial, as an equity case, before the special term, and the only question submitted to me is as to the right of the plaintiffs to have the policy of insurance reformed, in what they allege to be a mistake.

Upon the trial, it appeared that the testimony of the witnesses

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did not agree as to the facts. The broker who obtained the insurance states a case from which such a mistake might be inferred, while the agent of the defendants denies such statements, and shows, on his part, that no such mistake occurred, but that the policy was made out in strict compliance with the application of the broker, as to some of the matters stated by the plaintiffs' witness. He is also contradicted by a clerk in the office of the defendants.

I am not able to say, under such circumstances, that the plaintiffs have made out a case entitling them to the relief they ask for.

1. Because the evidence is contradictory, and the weight of the evidence is against the plaintiffs.

2. Because if the witnesses on both sides are correct in their testimony, it shows that the contract was made under a mistake of the contracting parties, and not that the mistake occurred in filling up the policy. Equity has no authority to make a contract for parties which they never entered into, and where the relief sought is to reform a contract, that can only be to make the contract as both parties intended to make it. The plaintiff has no more right to have the contract made as he intended it to be, than the defendant has to alter it according to his understanding; and unless it clearly appears that both parties agreed together, as the plaintiffs allege they did, he cannot have the relief he seeks for.

The only conclusion I can adopt on this evidence is, that there was a mutual mistake as to the description of the premises, arising from a misunderstanding of the parties in the original negotiation of the contract, and that the defendant's agent, in making the policy, made it as he intended it to be when he agreed to insure the property. The policy was made out according to the description entered by him in the books of the company, was delivered in that form to the plaintiff's agent, and, although corrected afterwards in another matter, was never objected to for the cause now alleged, until after the fire had taken place. It is true, this agent says, his attention was never called to it until after the fire, but still there is nothing to show any error on the defendant's part.

Upon this branch of the case, I am clearly of the opinion that the plaintiff is not entitled to the equitable relief demanded.

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Another question is presented in this action, under the Code, which is not free from difficulty. The plaintiffs ask to have a further trial as to their right to recover on the policy of insurance as it is, although the equitable relief sought is denied.

Under the former system, there was no doubt as to the rule, that if the equitable relief sought for was granted, a court of equity obtained jurisdiction over the whole subject-matter, and could adjudicate upon the same, although the plaintiff had a legal remedy. (4 *Cow.*, 707; 10 *Johns.*, 596.)

But if the plaintiffs fail entirely in obtaining the equitable relief asked for by them, I am not aware that the court ever retained jurisdiction of the subject-matter, to enable the plaintiffs to recover the claim, for which, under other circumstances, or independent of the equitable relief sought, their remedy was purely legal. (1 *Gil.*, 187.) By the constitution, this jurisdiction, both equitable and legal, is now vested in the same tribunal, and by the Code, the distinction between equitable and legal remedies is said to be abolished, although by some provisions therein such distinction is still maintained.

It has been doubted by some judges whether such distinction can be abolished by the Legislature, further than as to the mode of proceeding. A different construction was given to the Code by the Court of Appeals, in *Giles v. Lyon* (4 *Comst.*, 600), GARDNER, J., referring to the 69th section of the Code abolishing the distinction between actions at law and suits in equity, and the preamble to the Code declaring that such distinction should not be longer continued, says, "They (the legal and equitable remedies) were to be blended and formed into a single system, which should combine the principles peculiar to each, and be administered thereafter through the same forms, and under the same appellation." The case of *Marquet v. Marquet and wife*, seems to involve this question. This case was tried as an equity cause, before the special term, without a jury, and was one in which the plaintiff only demanded equitable relief.

Upon the trial, Mr. Justice Parker decided that the plaintiff was not entitled to the relief demanded, but inasmuch as it appeared that the plaintiffs had a legal claim to recover back money paid by them to one of the defendants, he rendered judgment against one defendant, and dismissed the complaint as to the other.

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This decision was reversed at the general term, the court holding that, inasmuch as the plaintiff had failed as to the equitable relief demanded in the complaint, they could not recover against the defendant for a claim not stated in the complaint, and of an entirely different nature. (7 *How. Pr. R.*, 417.) The Court of Appeals (in 2 *Kern.*, 336) held that the special term was right in its judgment. They say, "the case made by the complaint, and the limits of the issue, alone determined the power of the court. These expressions of the statute include the statement of the right of the plaintiffs, and its infringement by the defendants. These constitute the case."

"The addition to these material facts of others, which neither show a right in the plaintiffs nor a wrong thereto on the part of the defendants, do not add to or alter the legal case contained in the complaint."

"Those matters in the complaint which did not show a right in the plaintiffs, were simply to be disregarded if there were other facts which made out a cause of action."

In *Clary a. Goodman* (2 *Kern.*, 26), JOHNSON, J., says: "Since the enactment of the Code, which in terms abolishes the distinction between actions at law and suits in equity, and prescribes but a single form of civil action, the question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defence, but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish," &c.

The views, however, so strongly expressed in these cases, appeared to have been somewhat modified in *Reubens a. Joel* (3 *Kern.*, 488), in which it was held that in an action to recover a debt the plaintiff could not unite with such claim one to restrain his debtor from disposing of his property fraudulently.

SELDEN, J., in the opinion delivered in that case, says: "It is, in my judgment, clear that the Legislature has not the constitutional power to reduce all action to one homogeneous form, because it could only be done by abolishing trial by jury, or by abolishing trial by the court," &c.; and again: "this case (of *Parson a. Bedford*, referred to) is a direct authority to show that the constitution, by conferring jurisdiction in law and equity, has not only recognized the distinction between them, but placed that distinction beyond the power of the Legislature to abolish

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it, which it could only do by abolishing one or the other;" and in the latter part of his opinion he says, "such would tend to confusion and be impracticable, as it would convert an action sounding only in damages, and to be tried by a jury, into an action seeking equitable relief, and triable by the court."

This case seems to depart from the cases before referred to, so far as to hold that the distinction between actions of a legal and equitable nature must be observed so far as relates to the mode of trial, and cannot on that account be united together.

If this be so, then the old rule, which required jurisdiction to be obtained by a court of equity, in order to warrant it in giving the remedy which without it would have required an action of law triable by a jury, must still be observed.

The plaintiff's counsel relies upon the case of *Bidwell a. The Astor Mutual Insurance Company* (19 *N. Y. R.*, 263), as an authority in his favor. But in that case the equitable relief sought for was granted, and the court held that in such a case there was no need of a new action to recover damages. It is said expressly, "the rule of courts of equity was, when they had acquired jurisdiction, and had the whole merits before them, to proceed and do complete justice."

In the present case, the plaintiffs have tried their action before me as an equity case, without a jury. Upon that issue they have failed, and judgment must be rendered dismissing the complaint. I am of the opinion that there is no authority for me to try the right of the plaintiffs to recover for the loss under the policy, or to send the case again to a jury for a second trial. Such a course would necessarily involve two trials, perhaps two judgments in favor of different parties, and produce difficulties which could not well be surmounted.

The dismissal of the complaint, however, must be without prejudice to the right of the plaintiffs to bring a new action upon the policy, and, under the circumstances of this case, without costs.

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New York Common Pleas; Special Term, January, 1860.

GUARDIAN AD LITEM.—ATTORNEY.

Though a guardian *ad litem* or next friend for an infant plaintiff, is entitled to have any expenses, necessarily incurred by him in the action, reimbursed out of the proceeds recovered, yet his application to the court for that purpose, must be made before the fund has been paid over by the attorney to the plaintiff.

After the attorney has paid over the proceeds of the action to the plaintiff, without notice of the claim of the next friend, he will not be held liable to reimburse to the next friend expenses incurred by the latter.

Motion on behalf of the plaintiff's next friend, that the plaintiff's attorney reimburse to him his expenses in the action.

The facts are stated in the opinion.

HILTON, J.—A *prochein ami* or *guardian ad litem* for an infant party to an action, is a species of attorney whose duty it is to prosecute for the infant's rights, and to bring those rights directly under the notice of the court (*Knickerbocker v. De Freeat*, 2 *Paige*, 304); but he can do nothing to the injury of the infant, and, therefore, cannot compromise or settle his suit (*Miles v. Kaigler*, 10 *Yerg. (Tenn.) R.*, 10), and a payment to him is not a legal satisfaction, unless ratified by the infant on obtaining his majority. (*Allen v. Roundtree*, 1 *Speers (S. C.) R.*, 80.) He is not regarded for any purpose as a party to the suit, and his duty ends when it is prosecuted to final judgment. (*Brown v. Hull*, 16 *T. R.*, 673; *Jarvis v. Boyd*, 5 *Porter's (Ala.) R.*, 388.) And in *The People v. N. Y. Common Pleas* (11 *Wend.*, 166), it was held that the only reason for his appointment was, that there might be a responsible person before the court accountable for the costs of the action.

Anciently, the custom was to appoint officers of the court, but as was said by Chief-justice Willes, in *Slaughter v. Talbott* (*Willes*, 190), the practice was altered for the reason that the

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court would not subject its officers to this liability for costs ; and in awarding the attachment then ordered against the next friend for the costs of the suit, it was remarked by Mr. Fortescue Aland, that " the *prochein amis* may have satisfaction over against the infants, and generally they take security."

The same liability still exists, and it is enforced in the same manner. (*Code*, §§ 316, 115.)

The appointment as guardian, or next friend, for an infant plaintiff, cannot be forced upon any person against his consent, nor can he, after his appointment, be compelled to incur, in the prosecution of the suit, any liability other than for the costs of the adversary if the infant fails in the action, and for which he has his remedy against the infant's estate by a proper proceeding ; and he is not permitted to receive any property of the infant until he has given sufficient security, approved by a judge of the court, to account for and apply the same under the direction of the court (*Code*, § 420), except such costs and expenses as may be allowed to him by the court, out of the moneys recovered by the infant in the suit. (*Rule* 62.)

It appears, in this case, that the infant plaintiff recovered a judgment in her favor for over \$3000, and married during the pendency of the action. At its commencement the defendant was arrested, and, in lieu of bail, deposited with the clerk of the court \$2500, which, after the judgment, was by the order of the court paid over to her attorney. While it was in his hands, she and her husband—who, it appears, had been appointed guardian of her person and estate by the surrogate—joined in a notice to the attorney, forbidding the payment of the money to any person other than such husband and guardian, and the money was subsequently so paid, and the attorney discharged from all claim in respect to it, by a receipt in full, signed by the guardian and the infant plaintiff. Subsequent to this payment being made, the next friend of the plaintiff in this suit notified the attorney not to pay over the money, as he had a claim upon it for the expenses and disbursements made by him as guardian or next friend in the action ; and I am asked to enforce this claim by an order directing its payment by the attorney, and, in case of refusal, to compel obedience by attachment.

If it was admitted that any part of the money named remained in the hands of the attorney, there can be no doubt of the power,

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under the rule to which I have referred, and upon general principles applicable to such cases, to allow the guardian, out of the fund, a sum sufficient to reimburse him for his costs and expenses in the action, when the amount expended should be ascertained; and in such a case, after the allowance should be made, and the attorney had notice of it, any payment thereafter by him to the prejudice of the guardian would probably be at the attorney's risk and peril; but I can perceive no propriety in making the order here asked for, after the fund has passed from the custody and control of the court, and has been paid by the attorney to the only person appearing authorized to receive the same, prior to any allowance of the kind referred to being made by the court, and before the attorney had notice of the guardian's intention to lay claim to any part of the fund.

As I before remarked, the guardian was under no obligation to make advances for the purposes of the suit; and, as he volunteered to make them, he should have seen to having his application for reimbursement made while the fund remained in the custody of the court. Had he applied in time, a proper allowance would have been granted to cover his expenses, but he has seen fit to wait until the money has passed from under our control, and we can afford him no relief in the way he suggests, but must leave him to such remedy as he may have by an ordinary action, or by a proceeding against the moneys in the hands of the husband and guardian.

Motion denied.

 GREENE *v.* BRECK.

Supreme Court, First District; Special Term, January, 1860.

CREDITOR'S ACTION.—PARTIES.—DEFECT OF PARTIES.

A creditor cannot maintain an action in his own behalf alone, to set aside an assignment for the benefit of creditors, made contrary to the statute respecting limited partnerships. He must sue for the benefit of himself and the other creditors.

Where the statute prohibits an assignment for benefit of creditors, such an assign-

*Reversed,
32 Barb. 73.*

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ment if made without preferences, will not be set aside at suit of one creditor, to enable him thus to obtain a preference.

Where in such an action the assignee is made a party, his objection that the creditor does not sue on behalf of others as well as of himself, is not a mere objection for defect of parties, and it may be taken for the first time at the trial.

Motion at the trial to dismiss complaint.

This was a creditor's action brought by the plaintiff, an executor, appearing as sole plaintiff, seeking to set aside an assignment for benefit of creditors which the debtors, who composed a limited partnership under the Revised Statutes, had made.

INGRAHAM, J.—It is not necessary, nor would it be proper, for me to express an opinion now upon the question whether the assignment made of the effects of the limited partnership should be declared void. If it gave a preference to one creditor over another, as alleged in the complaint, it would be; but if made for the purpose of distribution among all the creditors in the same mode as the statute requires the property of such partnerships to be distributed, it may be necessary for the plaintiff to show something more than the mere execution of the assignment, to justify the appointment of a receiver.

But I am of the opinion that this action should have been brought in the name of the plaintiff, for the benefit of himself and the other creditors. Such I understand to be the decision in *Inness v. Lansing* (7 *Paige*, 583), and such is the necessary consequence of the provisions of the statute. (*Whitewright v. Stimpson*, 2 *Barb.*, 379.) In *Walker v. Crain* (12 *Barb.*, 119), the court say, "the intent of the act was, that the fund should be applied to the payment of the debts of the creditors without preferences, so that they should be paid in equal ratio." This was in reference to manufacturing companies, but there the same course was contemplated by the statute.

If the assignment provided for an equal distribution among all the creditors without preference, it would hardly be carrying out the intent of this statute to declare such an assignment void, for the purpose of enabling one creditor to obtain a preference, in direct violation of the provisions of the statute intended to prevent such preferences.

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The objection that this is a defect of parties is not well taken. The assignee is made a party, and as such, he represents all the creditors, and may take the objections at the trial.

I think the complaint should be dismissed, but with leave to the plaintiff to amend his complaint within twenty days, on payment of the costs of the term.

NEW YORK SHOT AND LEAD CO. *a.* CARY.

Supreme Court, First District; Special Term, January, 1860.

FORECLOSURE.—INJUNCTION.

Leasehold premises, subject to a mortgage, were sold on execution under a judgment prior thereto, and the certificate of sale was assigned to the owner of the equity of redemption of the mortgaged premises. The mortgage having been foreclosed, and a decree of sale obtained, the owner of the equity of redemption brought an action to settle the rights of the parties, and asked for an injunction to stay the sale.

Held, That the injunction should be denied. 1. The plaintiff's interest as owner of the equity of redemption was undoubtedly subject to the mortgage; and the fact that he held a title under the sheriff's sale, did not alter the rights of the parties in the other estate.

2. The plaintiff in the foreclosure was not limited to redeeming as a mortgage creditor.

3. The fact that the estate foreclosed was small and rapidly expiring, was a reason for not delaying the sale.

The rights of the parties should be determined as they existed at the commencement of the action.

Motion for an injunction.

The facts are stated in the opinion.

S. P. Nash, for the motion.

John T. Hoffman, opposed.

INGRAHAM, J.—McCullough, while the owner of the lease of the premises in controversy, executed a mortgage thereon to Cary, in October, 1855, which mortgage Cary has foreclosed,

and now has a judgment directing the sale of the premises to pay the same.

Under a prior judgment against McCullough, the right and title of McCullough has been sold, and the same has, by assignment from the purchaser at such sale, been vested in the plaintiff. The time for redeeming the premises from the sale on execution has not yet expired.

The plaintiffs also hold by conveyance, subject to Cary's mortgage, the title to the premises, and are in possession.

They commenced this action, asking to have an injunction restraining the sale under the mortgage foreclosed, for the purpose of having a separation made between the property subject to the mortgage, and the property of the plaintiffs which they have placed upon the premises; and also claiming that, inasmuch as they will obtain, in February, a full title to the premises, that the sale under the mortgage should be stayed.

It is apparent that if this application is granted, the lien of the mortgage ceases, and becomes of no value.

The sale under the judgment becomes perfect by the lapse of fifteen months thereafter, if not redeemed, and such sale then becomes a title paramount to the mortgage. If there is any interest not included in such sale, justice requires that the same should be applied to the payment of the mortgage debt.

The interest which the plaintiffs hold in this property by conveyance from McCullough, is undoubtedly subject to the mortgage lien, and should be sold to pay that claim. The subsequently acquired interest by the purchase of the sheriff's certificate of sale, does not alter the rights of the parties in the other estate; until that sale becomes perfect, it gives the plaintiffs no title to the possession, and takes away from the mortgagee no rights which he otherwise possessed.

That estate or interest which the plaintiffs hold as grantees of McCullough, should not be relieved from the lien of the mortgage. Whatever it is, whether greater or less, the mortgagee has a right to require that it should be sold for the purpose of discharging his lien. The consequences of such sale to the plaintiffs, in divesting them of possession until their title under the judgment becomes perfect, should have no weight in the decision of this motion.

It is the same in the case of all judicial proceedings, where the

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debtor suffers from the attempts of the creditor to enforce payment of his claim. The company are nothing but such debtors or holders of the estate, subject to such claim under the mortgage, and having a prior lien as purchasers of the sheriff's certificate, not entitled to the possession under the purchase until that estate becomes absolute, and not liable to be defeated by any judgment-creditor who sees fit to redeem and take the rights which they hold.

It was urged that the mortgagee was concluded so far as to have no remedy since the sale, and the expiration of the time of redemption, by the owner of the fee, except to redeem as a mortgage creditor. I do not concur in that position. Whatever estate remained intermediate, the judgment of foreclosure, and the time when the purchase under the judgment becomes perfect, belongs to the mortgagor or his assignees, and is subject to the mortgage.

The fact that it is small and fast expiring, is the strongest reason why the sale should not be delayed.

I find nothing in the authorities cited which will justify me in depriving the mortgagee of the small remnant of security which he has for redress.

There are other reasons also why this sale should not be stayed. The rights of the parties should be considered, as they existed at the time of commencing the action, and the subsequent purchase of claims ought not to be considered sufficient to warrant the course asked for by the plaintiffs.

Besides the sale of this interest, whatever it may be, seems to be necessary as well to protect the plaintiff in the foreclosure, as to his claim for deficiency and his claims upon the appeal.

I think the motion should be denied, and the temporary injunction dissolved.

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FARMERS' AND MECHANICS' BANK *v.* THE EMPIRE STONE DRESSING COMPANY.

New York Superior Court; General Term, October, 1859.

REFEREE'S FINDING.—CORPORATION.—BILLS, NOTES, AND CHECKS.

The by-law of a corporation, authorizing its officers "to accept bills of exchange in the prosecution of the business of the company," is no authority for making an accommodation acceptance.

A finding in the report of a referee, that the defendants, a corporation, "duly accepted" a bill, is to be construed as importing that their officer who signed the acceptance had authority so to do.

One who purchases a note or bill, drawn, indorsed, or accepted by a manufacturing corporation, cannot, without inquiry into their authority to make, or the authority of their officer or agent to bind them by, such a contract, rely on the mere fact of the drawing, indorsing, or accepting, and claim to be regarded as a *bona-fide* holder for value, without any reference to the question of actual consideration, or to that of the authority of the officer or agent.

One who discounts a bill for value and without notice, before acceptance, though he becomes thereby a *bona-fide* holder as against the drawer, does not thereby become a *bona-fide* holder for value as against the subsequent acceptor.

Discounting a bill in the expectation that it will be accepted as previous similar bills had been, is not discounting it on the faith of an acceptance.

A corporation whose agent without authority accepts a bill on them, which it was not competent for them to accept, are not rendered liable by the fact that the holder of the bill relying upon the acceptance, held the bill till maturity, instead of suing the drawers for non-acceptance.

Appeal from judgment on the report of a referee.

The facts of the case found by the referee were thus stated in his report.

The plaintiffs were a corporation duly created by the Legislature of the State of Connecticut, in 1833, and they transacted their business at Hartford, in that State. The defendants were a corporation organized under the General Manufacturing Law of the State of New York, passed in 1848.

Between the 5th day of April, 1854, and the 7th day of May, 1854, the defendants duly accepted a certain bill of exchange

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for \$2000, drawn by the Hartford County Quarry Company, upon the defendants, dated on said 5th day of April, and payable to the order of Charles T. Shelton, in sixty days after the date thereof. The same was discounted at legal rates, on or about its date, by the plaintiffs, for and at the request of the drawers thereof.

Through an oversight this bill was not indorsed by the payee thereof until after maturity and protest thereof for non-payment.

Between the 19th day of May, 1854, and the 21st day of June, 1854, the defendants duly accepted a certain other bill of exchange for \$500, drawn by the Hartford County Quarry Company upon the defendants, dated on the said 19th day of May, and payable to the order of Clark R. Shelton, in thirty days from the date thereof. The same was, on the day of its date, indorsed to the plaintiffs, who discounted the same at legal rates, for and at the request of the drawers thereof.

Neither of these acceptances was made in the prosecution of the business of the defendants, but solely for the accommodation of the drawers thereof, and the defendants never received any consideration for such acceptances, but the plaintiffs had no actual notice thereof.

There was a payment made to said plaintiffs, on account of the indebtedness arising upon said acceptances, of \$500, on the 12th day of October, 1855, the balance due on the said acceptances being still due and unpaid.

The referee therefore found, as a conclusion of law, that the defendants were indebted to the plaintiffs in the balance of said indebtedness, with interest.

From judgment entered for the plaintiffs on this report the defendants appealed.

Charles F. Sanford, for the appellants.—I. The defendants never accepted either of the drafts, and can be charged with no liability upon either, except in the hands of a *bona-fide* indorsee, for value, before maturity. 1. The *act* of Sherman in accepting these drafts, was not within the scope of the authority conferred upon him by the by-law. Special or limited powers are to be construed strictly; *e. g.* a power to make notes in the prosecution of a mechanical business cannot be construed as a

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power to make notes for the accommodation of third parties. (Warren *a.* Tysen, 3 *Hill*, 279.) The act of Sherman, therefore, under consideration, was not only in excess of the authority conferred upon him by the by-law, but, as it involved a wilful violation of duty, amounted, if not to forgery, at least to heinous fraud. 2. If the delegated power had contained no express limitation, the *act* would have been a nullity, for the defendants themselves *could not* under their charter (*i. e.* the General Manufacturing Law and their certificate of incorporation), issue accommodation paper, for the purpose of enabling third parties to raise money thereon. (2 *Rev. Stats.*, 596; *Ib.*, 657, 5th ed.; Talmadge *a.* Pell, 3 *Seld.*, 328; Bank of Genesee *a.* Patchin Bank, 3 *Kern.*, 314.) 3. The attempted exercise of such a power is a violation of the restraining act. (Attorney-general *a.* Life and Fire Insurance Company, 9 *Paige*, 470; Schermerhorn *a.* Talman, 4 *Kern.*, 140.) 4. Those who deal with an agent, acting under special powers, are chargeable with knowledge both as to the nature and extent of the limitations prescribed. (Atwood *a.* Mannings, 7 *B. & C.*, 278; Talmadge *a.* Pell, 3 *Seld.*, 328; Warren *a.* Tysen, 3 *Hill*, 279; Nixon *a.* Palmer, 4 *Seld.*, 398; Alexander *a.* Mackenzie, 6 *M. Gr. & S.*, 766; Mechanics' Bank *a.* New York and New Haven Railroad, 3 *Kern.*, 622.) 5. *A fortiori*, if a corporation, the mere creature of legislation, transcends corporate powers, the dealer must be charged with notice, since, in such case, the limitations to its authority are not only defined in writing, but are matter of public law and public record. (Bank of Genesee *a.* Patchin Bank; Mechanics' Bank *a.* New York and New Haven Railroad, cited above.) 6. The case of the Farmers' and Mechanics' Bank against the Butchers' and Drovers' Bank (16 *N. Y.*, 125), so far as it controverts these positions, is applicable solely to negotiable commercial paper, in the hands of *bona-fide* indorsees for value, before maturity.

II. But the \$2000 draft was not, at the time of its transfer, nor at any time during its life, a negotiable instrument. It was not indorsed by the payee till long after its maturity. 1. Prior to the Code, the transfer of a bill payable to order was only properly made by indorsement. In no other way could the transfer convey the legal title, so as to enable the holder to recover at law. (*Story on Bills*, § 201; Gibson *a.* Minet, 1 *H. Bl.*, 605;

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2 *Story Eq.*, §§ 1036-7, 1044-7.) 2. In case of an assignment without indorsement, the holder acquired only the rights which he would have acquired upon the assignment of a bill not negotiable. (*Story on Bills*, § 201; 2 *Story Eq.*, § 1047; *Murray v. Lylburn*, 2 *Johns. Ch.*, 441; 2 *Vern.*, 692; 1 *Ves.*, 123.) 3. In such case the holder, having an equitable interest, might sue in the name of the person having the legal title. (*Pearse v. Hirsh*, 10 *B. & C.*, 122; *Chitty on Bills*, 536.) 4. The Code has changed the law in this respect, so far as to permit the assignee to maintain the action in his own name, but as regards equitable defences the law remains the same. (*Hastings v. McKinley*, 1 *Smith*, 273; *Code*, §§ 111, 112.) 5. The holder may, in certain instances, compel a payee who transfers a bill, without indorsing it, to indorse. (*Story on Bills*, § 201.) 6. But the object of such compulsory indorsement is to change the assignor as indorser; not to give the holder, as against prior parties, any rights which the assignor, at the time of such compulsory indorsement, did not himself possess. (*Chitty on Bills*, 244, 246.) 7. An *intended* indorsee, when a bill has, *by neglect*, been transferred to him without indorsement, might, formerly, sue in the name of the payee. (*Ib.*, 536; *Pearse v. Hirsh*, cited above; 5 *Man. & Ryl.*, 88.) 8. Now under the Code, as already suggested, he may sue in his own name, but, obviously, subject to all existing equities; since, on general equitable principles, if a party, by his own neglect (and in the absence of fraud), has failed to acquire legal but not equitable rights, which, but for such neglect, he could have secured, no court of equity will interfere to vest him with those rights, because, in so doing, it must impose corresponding liabilities, which are not equitable, but strictly legal, and from which that neglect has occasioned exemption. Thus, if the holder of a bill, by his negligence or mistake, fails to give due notice to an indorser, no court of equity will interfere to enforce his remedy; or if he lose his right against a surety, by failing to proceed against the principal, he will not be entitled, in equity, to any relief. So, in the case of an intended indorsement by a payee, the court, while it compels the indorsement, so as to give a right of action against the payee as indorser, thus enforcing a purely equitable right, will never interfere to exclude equitable defences, but will leave the party to the just consequences of his

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negligence. (Franklin Bank *a.* Raymond, 3 *Wend.*, 69; 13 *Mass.*, 305.) 9. A voluntary indorsement, after maturity, is only equivalent to an assignment, and is made subject to all equities between the original parties. (Williams *a.* Matthews, 3 *Cow.*, 252.) 10. As between the original parties, the want of consideration is a good defence. (People *a.* Howell, 4 *Johns.*, 296; Pearson *a.* Pearson, 7 *Ib.*, 26; Schoonmaker *a.* Koosa, 17 *Ib.*, 301; Slade *a.* Halstead, 7 *Cow.*, 322; Bank of Troy *a.* Topping, 9 *Wend.*, 373; Franklin Bank *a.* Richmond, cited above.)

III. The acceptance of the \$500 draft is not, and does not on its face purport to be the act of the defendant. In this respect, it differs from the other which is accepted in the defendant's name. Upon this draft, George Sherman is the acceptor, and he alone is liable as such. The word "Secy." appended to his signature is merely *descriptio personæ*. (Hills *a.* Bannister, 8 *Cow.*, 31; Taft *a.* Brewster, 9 *Johns.*, 334; Stackpole *a.* Arnold, 11 *Mass.*, 27; Pentz *a.* Stanton, 10 *Wend.*, 271; Barker *a.* Mechanics' Fire Insurance Company, 3 *Ib.*, 94; Moss *a.* Livingston, 4 *Coms.*, 208; DeWitt *a.* Walton, 5 *Seld.*, 371; Bolles *a.* Walton, 2 *E. D. Smith*, 164.)

IV. The plaintiffs are not *bona-fide* indorsees for value of either acceptance. 1. The defendant having shown that neither the Quarry Company, nor Shelton could have recovered upon the drafts, for the reasons above urged, the burden of proof was thrown upon the plaintiffs to show that they parted with value, in the regular course of business, before the maturity of the drafts, and on the faith of the acceptances. A mere credit to the drawer on the books of the bank of the proceeds of the discount is not parting with value; and in the entire absence of any personal knowledge on the part of the cashier, as to such proceeds having been drawn, the plaintiffs have failed to sustain their title as *bona-fide* holders for value. 2. Again, the drafts were respectively discounted on or about the day of their date, and were subsequently forwarded to New York for acceptance. The plaintiffs therefore, if they parted with value at all, did so on the faith of the drawer's responsibility, not on that of the acceptor's.

William E. Curtis, for the respondents.—I. The acceptances were not accommodation. The failure of the defendants to pro-

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duce and show the general account between the companies where these drafts are charged, and the character of their transactions appears, establish the presumption that the acceptances were made in their ordinary course of dealings, either as payments or advances for stone quarried and delivered, or to be quarried or delivered. The act of Sherman in accepting these drafts was within the scope of his authority, as represented and recognized by the defendants in their dealings with third parties, and as established by by-laws. (The United States *a.* City Bank of Columbus, 19 *How. (U. S.) R.*, 385.)

II. If, for the purposes of the argument, it is conceded that defendants' secretary exceeded his authority, and that the drafts were accommodation drafts, the plaintiffs, having discounted the same in the ordinary course of business before maturity, and without notice, come within the rule, that as between two innocent parties thus situated, the principals in whose name the drafts were accepted, rather than the holder of the drafts, should suffer for their misplaced confidence.

The same principle applies to the acts of the officers of a corporation as to a partner of a mercantile firm who affixes the firm-name to a paper in which the firm has no interest. Where such paper is negotiable, and passes to an innocent holder for a valuable consideration, the corporation is bound; and doubly so, when by their conduct they have also induced the party to take it. (The Bank of Genesee *a.* The Patchin Bank, 3 *Kern.*, 315-317; Attorney-general *a.* Life and Fire Ins. Co., 9 *Paige*, 470; Belmont *a.* Coleman, 1 *Bosw.*, 195; Hovey *a.* A. M. Life Ins. Co., 11 *Paige*, 635; Mechanics' Bank *a.* N. Y. & New Haven R. R., 3 *Kern.*, 622, 626; Farmers' and Mechanics' Bank *a.* Butchers' and Drovers' Bank, 16 *N. Y. R.*, 125; Exchange Bank *a.* Monteith, 17 *Barb.*, 171; De Zeng *a.* Fyfe, 1 *Bosw.*, 336.)

III. The plaintiffs do not hold the two thousand dollar draft subject to the equities affecting it in the hands of the indorser, by reason of his omitting to indorse it at the time of the transfer.

The subsequent indorsement has relation back to the time of the delivery of the bill, and was sufficient to give effect to the antecedent right that vested at the times when the consideration was paid. (*Chitty on Bills*, 8 Am. ed., 263; *Story on Bills*,

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§ 201; *Watkins a. Maule*, 2 *Jac. & Walk. R.*, 244; *Renfield a. Morgan*, 12 *Johns.*, 346; *Prescott a. Hall*, 17 *Id.*, 284.)

BY THE COURT.*—WOODRUFF, J.—The defendants are a corporation, organized under the general manufacturing law of this State, passed in 1848. (*Sess. Laws of 1848*, ch. 40, 54.)

They are sued upon two bills of exchange, drawn upon them by the Hartford Quarry Company, and which were, in terms, accepted by the defendants' secretary.

It is expressly found by the referee, that "neither of the said acceptances was made in the prosecution of the business of the defendants, but solely for the accommodation of the drawers, and that the defendants never received any consideration for such acceptances."

This finding is in clear conformity to the weight of the evidence. The secretary of the defendants, by whom the acceptance was written, and whose duty it was to keep their books and accounts, testifies that, so far as he knows, there was no consideration for the acceptance; that it was his impression at the time, that the acceptances were made for the accommodation of the drawers solely; that no consideration passed from any one to him, or to the defendants, so far as he knows; that although he cannot testify that he knows, of his own knowledge, that they were without consideration, and accepted for the accommodation of the Hartford Quarry Company, that is his impression and belief; and, it having been suggested that the defendants had accepted drafts in payment for stone shipped to them by the Quarry Company—and this being indeed the only consideration which it was claimed by the plaintiffs the defendants had received—the secretary testifies, of his own knowledge, that "they were not made for stone."

The president of the defendants, who told the secretary to accept the bills, testifies, in explicit terms, that they were accepted for the accommodation of the Quarry Company.

The treasurer of the defendants testifies that, at a date prior to the date of these bills, he was chosen treasurer, and from that time until long after the maturity of the bills he had the sole management of the financial affairs of the defendants, and that

* Present, HOFFMAN, WOODRUFF, and PIERREPONT, JJ.

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he did not as treasurer, or in any way, receive any consideration for the acceptances, and that the company did not, to his knowledge.

There is no testimony in contradiction of this evidence. The only testimony which in any degree tends to show consideration, is that of Julius H. Pratt, a director of the Quarry Company, and a trustee of the defendants. He knows the general fact that the Quarry Company sent stone to the defendants, but his testimony is chiefly hearsay. He says, in terms, he does not know what was the consideration of these acceptances. He says he did not know what was the state of the accounts between the two companies in the spring of 1854, and he adds that he does "not think anybody did."

The finding of the referee on this point is, therefore, in accordance with the proofs. The acceptances were without consideration, and for the accommodation of the Hartford Quarry Company.

The secretary of the defendants had no authority to accept for the accommodation of third parties. The by-laws authorized him "to accept bills of exchange in the prosecution of the business of the company." That business was, "the business of cutting, sawing, and dressing stone of all kinds, and the business of stone-cutting in all its branches."

It may, perhaps, be conceded that the certificate of incorporation, under the clause last quoted, would authorize the purchase of stone to be cut or dressed, and then that the by-law would authorize the secretary to accept bills in payment for stone purchased. But no latitude of construction would extend the authority conferred, in the language above cited, so as to include an authority to accept for accommodation merely, and without any consideration.

The president told him to accept the bills, but the evidence fails to show that either he or the president, or both, had any authority to bind the defendants by such an acceptance.

If the report of the referee, that "the defendants duly accepted the bills," is to be taken as importing that the secretary had authority to accept accommodation bills, then his report is, in this respect, against the weight of the evidence, and the judgment should be reversed on that ground, unless we can now hold, upon the other facts, that the defendants are liable, whether the

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secretary was authorized to accept such bills or not, and alike liable in either case.

If the report is not to be taken to find such authority, then there is no finding on the point, and a new trial should be granted, because enough is not found to sustain the judgment, unless, as before, we are prepared to say that the question whether he had authority or not is immaterial, and the defendants are liable, although the secretary was not authorized to accept these bills.

This, I apprehend, cannot be correctly held. On the contrary, the right of the plaintiffs, in my judgment, depends primarily upon the question whether the secretary of the defendants had authority to accept bills for the accommodation of a third party. If he had, then the plaintiffs are doubtless entitled to recover; and when this case was before the general term, in January, 1858, there was an express finding by the referee, that the secretary of the defendants was "duly authorized" to accept these bills. If that were true as matter of fact, the cases which hold that an accommodation acceptor, whose acceptance is given without restriction as to its use, and especially where it is given for the very purpose of securing a third party, is bound thereby, would apply to this case.

It is, however, obvious that a finding that the secretary was "duly" authorized to accept accommodation bills, involves the legal proposition that the secretary of a manufacturing corporation may be duly authorized to accept accommodation paper, that the corporation have legal power to make such an acceptance, and that all things had been done which are requisite to confer such legal authority on the secretary.

Although it may be true that a corporation, having authority to accept for the purposes of its business, may exceed their legitimate power, and so accept, that—as against a third person relying on the representations of its agents, or advancing money on the faith of the acceptance—it will not be permitted to allege the true character of the acceptance to defeat a recovery; still it is, we think, quite clear that neither the secretary of a manufacturing corporation, nor any or all of its officers, have, as matter of law, any legal authority so to accept; and that in this case, under the charter, or the general principles applicable to the subject, the secretary of the defendants had no such authority; and if not, then the question will arise, whether he was clothed with

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such authority to accept, for the purposes of the company, that a third person had a right to rely upon his act of acceptance without further inquiry, and by advancing money or giving credit on the faith thereof, without notice that the bill was an accommodation bill, would become entitled to hold the company, notwithstanding the secretary had no legal authority from the defendants to accept accommodation bills? And if this last question be answered affirmatively, then, are these plaintiffs *bona-fide* holders, without notice that the bills in question were accommodation bills, who have given value, therefore, upon the credit of the acceptance, and in reliance upon the apparent authority of the secretary?

I. Upon the first question the evidence is clear, and it has already been sufficiently noticed. The by-laws, under which alone the secretary had actual authority to accept any bills, confined such authority to the prosecution of the business of the company. There was no evidence that the powers of the secretary had been enlarged by any other means. Although the secretary states that it is his impression that he had previously made accommodation acceptances for the drawers of these bills, he also states that they were paid, as he supposes, by the drawers, and not by the defendants; and if a previous practice of giving out such acceptances would bind the company to a person who received them for value without notice, it is not shown that the trustees of this company ever sanctioned any such practice.

The referee finds that the present acceptances were not made in the prosecution of the business of the defendants. It must be adjudged, I think, that they were made by the secretary without authority.

II. Would these acceptances by the secretary bind the company in favor of a *bona-fide* holder of the bills for value paid upon the faith of the acceptances, and in reliance upon any apparent authority of such secretary to bind the defendants?

In *The Bank of Genesee v. The Patchin Bank* (3 *Kern.*, 309), the action was against the defendants as indorsers of a bill of exchange, discounted by the plaintiffs, and it appeared on the trial that the indorsement was by the cashier of the defendants, for the accommodation of a third party (a railroad company), and that the defendants had no interest in the bill which was so

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indorsed. It, however, appeared that in that case the proceeds of the discounted bill were sent by the plaintiffs to the defendants' cashier, from whom the bill was received for discount.

The Court of Appeals unanimously held that a charge to the jury, that "if the cashier had special authority from the Patchin Bank, or from the manager of the bank, to indorse the draft in question, the bank was bound by it although it was an accommodation indorsement for the railroad company, and the bill was made to raise money for it," was erroneous, and the judgment below was reversed for that error.

Mr. Justice Denio expressed the opinion, that had the charge annexed a further condition that "the plaintiff had received and discounted the bill, under a representation of the defendant that it was the owner of the bill, and that it was to be discounted for the defendant's benefit," the charge would have been correct, but the other judges declined passing upon that question.

That case, therefore, leaves it quite doubtful at least whether any or all of the agents of a corporation can bind such corporation, whose business is limited to the purposes of banking or of manufacturing, by an accommodation indorsement or acceptance made for purposes not within the scope of that business.

It is requiring very little of one who deals with a corporation having limited powers, to inquire whether the acts upon which he relies are within the scope of those powers; and I cannot think that a manufacturing corporation has such an unqualified authority to make promissory notes, or draw, indorse, or accept bills of exchange, that a third party may, without inquiry, rely upon their drawing, indorsement, or acceptance, and claim to be regarded as a *bona-fide* holder for value, protected against any inquiry into the consideration thereof, or into the actual authority of the officer or agent, or whether in truth the note or bill is issued for the proper purposes of the corporation. (Central Bank *a.* Empire Stone Dressing Co., 26 *Barb.*, 23.)

I do not think it necessary to pursue this question, for if the plaintiffs are not *bona-fide* holders for value paid in reliance upon the defendants' acceptance, and in faith that the secretary had authority to accept, then upon the case cited it is certain they are not entitled to recover. On the subsequent trial of the case of The Bank of Genesee *a.* The Patchin Bank, and on a second review thereof in the Court of Appeals, it was held, as

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we are informed, that the discount of the bill by the plaintiffs, on the application of the defendants' cashier, and the sending of the proceeds of the discount to the defendants, upon the representation that the defendants desired the discount for their own benefit, or in substance to that effect, and without any notice that the discount was for the benefit of a third party, made the plaintiffs *bona-fide* holders for value entitled to recover. That having a general power to procure notes held by them discounted, and to indorse them for that purpose, the defendants would not—after having made application therefor, obtained the discount, and received the money—be permitted to allege, as a defence, that in truth the discount was procured for another.

III. In regard to the claim of the plaintiffs to be *bona-fide* holders for value, it should be borne in mind, that to entitle one to enforce an indorsement or acceptance (which is otherwise invalid), on the ground that he is a *bona-fide* holder for value, it must appear that he parted with value upon the faith of such indorsement or acceptance. He may be a *bona-fide* holder of the bill for value paid therefor, and be entitled to enforce it against every other party thereto, and yet have no right to recover on such indorsement or acceptance.

This distinction is applicable to the present case, and defines the plaintiffs' relation to the bills here in question. They are *bona-fide* holders of the bills for value paid therefor to the drawers; and as to such drawers, they have a plain right to recover from them the full amount.

But they have paid nothing in reliance on the defendants' acceptance. The bills were discounted before they were accepted, and upon such discount the proceeds were placed to the credit of the drawers, and made subject to their checks, and the bills themselves became the property of the plaintiffs, and at that time there was no acceptance upon which the plaintiffs did or could rely. They were, therefore, not discounted upon the faith of the acceptances at all.

At the moment when the defendants' secretary accepted the bills, they were the plaintiffs' property, and they were the immediate parties to the contract which, without consideration and without authority, the secretary assumed to make.

The plaintiffs, no doubt, discounted the bills with an expecta-

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tion that they would be accepted, but they can in no just sense be said to have discounted the bills in reliance upon an acceptance which had not then been made.

They may have been induced to believe that the bills would be accepted, by the fact that they had held similar drafts which were accepted, and may have had the assurance of the drawer that they would be accepted. But relying upon their previous experience, or relying upon such an assurance, is by no means discounting the bills on the faith of the acceptances.

It is not shown that any one, who had authority from the defendants, gave them an assurance that the bills would be accepted; and if it had been shown that Charles T. Shelton, the defendants' president, had given the plaintiffs an unconditional promise that the bills should be accepted, the defendants would not have been bound—not merely because he had no authority to bind the defendants by such a promise, but especially because, by our statute, an acceptance must be in writing before it becomes binding as an acceptance, and an unconditional promise to accept must also be in writing, in order to bind the drawer of a bill. (1 *Rev. Stats.*, 768, §§ 6-8.)

It is suggested that the plaintiffs would have caused the bills to be protested for non-acceptance, and have had immediate recourse to the drawers if the defendants' secretary had not written an acceptance on the bills; and that, relying on the acts of the secretary, they have omitted such protest, and have waited until the bills became due before proceeding against the drawers, and that this delay is equivalent to discounting the bills, or paying value in reliance on the acceptance. This claim is as ingenious as I think it is novel.

If any fraud was practised on the plaintiffs to lull them into an unwarranted security, they may have recourse to the individuals who practised such fraud. But the defendants are not to be held by the unauthorized act of their secretary, merely because the plaintiffs, but for such act would have sought earlier redress.

As above suggested the plaintiffs had already become the holders of the bills, and when the alleged acceptance was written, it was an act to which the plaintiffs were direct and immediate parties. They were not bound to take an unauthorized acceptance—and they should have seen to it that the acceptance

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if given was authorized, and was an act to which the agent of the defendants could bind them.

It is proper to observe that when the case was before the general term of the court on a former occasion, there was not only a finding that the secretary had actual authority to accept the bills, but much stress was also placed upon the want of clear proof, that these bills were in truth accommodation bills for which the defendants had received no consideration, and also on the circumstance that the accounts between the drawers and the defendants were not produced.

On the present trial it was proved, without objection, that in proceedings in insolvency relating to the settlement of the affairs of the drawers of the bills, it was found that the drawers were indebted to the defendants. This may perhaps be deemed to strengthen the other proofs, already adverted to, that the bills were accommodation bills. At all events, the finding of the referee on that point cannot be disregarded, or be deemed against the evidence, when as it now appears it is so fully sustained.

The judgment should, I think, be reversed, and a new trial ordered. Costs to abide the event.

TOPLITZ *a.* RAYMOND.

New York Common Pleas ; Special Term, February, 1859.

CASE.—MOTION FOR NEW TRIAL.

Upon a motion for a new trial founded on a case, which motion was made before the judge who tried the cause, the case, as agreed upon by the counsel, stated a charge to have been made which was materially different from that which had been actually made by the judge.

Held, 1.—That the charge should be stricken out of the case, and a correct account of the charge inserted.

2. That, as the judge still adhered to the views expressed in the charge as so stated, the motion should be denied.

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But exceptions which were contained in the case thus agreed on should not be stricken out, although the judge's notes of the trial did not mention that any such were taken.

Motion for a new trial.

HILTON, J.—The plaintiff moves for a new trial on a case which appears to have been agreed upon by the counsel for the parties. In it is contained what purports to be the charge I gave to the jury on the trial, but which is so much at variance with the one which appears from my notes to have been delivered, that I have felt constrained to disregard that part of the case, and insert, in lieu of it, the charge actually made, so far as it is material for all purposes of review.

In saying so far as material, I mean that the charge I have written out contains all the propositions which were presented by me for the consideration of the jury.

I do not find in my notes any memorandum of a request to charge, or of an exception to any part of the charge as delivered; and although this would be sufficient to justify me in striking out all exceptions calculated to bring the views I did express to the jury before the general term for review, yet I have not done so, because I desire that the consent of counsel in this respect shall have full effect, so that if I committed any error it may be remedied upon appeal.

The opinions I expressed to the jury I still adhere to. If they are correct, then the questions were of fact for the jury to determine from the evidence, and their verdict cannot be disturbed.

The motion for a new trial is denied, with \$10 costs.

KENNEDY *v.* WEED AND WIFE.*New York Common Pleas; At Chambers, March, 1859.*

SUPPLEMENTARY PROCEEDINGS.—ERROR IN TRANSCRIPT OF JUDGMENT.—JURISDICTIONAL OBJECTION.

Supplementary proceedings cannot be maintained upon an affidavit which does not truly describe the judgment.

The plaintiff having recovered judgment against Ira Weed and Mary Weed, docketed a transcript in which the defendants were stated to be Ira Weed and Mrs. Weed.

Held, that supplementary proceedings founded upon such docketed judgment must be dismissed.

Such an objection goes to the jurisdiction of the judge granting the order, and cannot be cured by amendment, nor waived by the party; but is available at any time in the proceedings.

The defendants will not be punished for contempt for disobeying an order founded on such an erroneous affidavit.

Order to show cause why the defendants should not be punished as for a contempt.

The facts are stated in the opinion.

HILTON, J.—It is only when a transcript of a justice's judgment is filed, that it becomes a judgment of this court. (*Code*, § 68.) And after the return of an execution issued upon it unsatisfied, a judge of this court may require the defendant to appear and be examined upon supplementary proceedings. (§ 292.)

On the return of the order granted in this case, requiring the defendants to show cause why they should not be punished as for a contempt in disobeying the order directing them to appear and be examined concerning their property, it is made to appear on their behalf, that there is no such judgment docketed against them in this court, as that described in the affidavit on which these proceedings were instituted; the affidavit showing

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a judgment in favor of the plaintiff against "Ira Weed and Mary Weed," while the transcript docketed is of a judgment against "*Ira Weed and Mrs. Weed.*"

This seems to me to be a fatal objection, affecting the jurisdiction of the judge granting the order, and one which cannot be obviated by amendment.

The order supplementary must be predicated upon the fact that an execution has been issued on a specified and existing judgment, and returned unsatisfied in whole or in part. But when no such fact exists, the judge possesses no power to make the order for the examination of a party, or if made upon an affidavit specifying a judgment which has no existence, he can have no power to enforce obedience to its requirements.

When a special statutory jurisdiction is conferred, it must be strictly followed; and if at any stage of the proceeding it appears that the alleged facts upon which jurisdiction is based do not exist, it is the duty of the judge to dismiss the parties.

Jurisdiction in cases like the present is not a personal privilege which can be waived, nor can consent confer it; and if in any case the facts which authorize its exercise do not exist, the whole proceeding is *coram non judice*, and void. (Dudley *a.* Mayhew, 3 *Comst.*, 9.)

Motion for attachment denied.

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New York Common Pleas; Special Term, October, 1859.

EVIDENCE.—MARRIED WOMAN'S TITLE TO SEPARATE ESTATE.

What evidence is sufficient, in an action brought by a married woman, to show that the subject of the action is her separate estate.

Motion for a new trial.

HILTON, J.—Conceding the rule to be, that in actions brought by married women in respect to property claimed by

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them as their separate estate, they are bound to show affirmatively that it is so owned; I think the evidence in this case upon that point, although slight, yet it was sufficient to require its submission to the jury.

It appeared that she got \$300 from her cousin, and used it in the purchase of the property in question.

The defendant's counsel at the time did not see fit to inquire whether the money thus obtained was borrowed, or whether the husband was in any way liable for it.

The jury, therefore, were justified in regarding it as money belonging to her individually, and the property purchased with it as her separate estate.

Besides, the bill of sale of the property was to her individually, which was at least *prima facie* evidence of her ownership, until impeached; and whether or not it was impaired in any degree either by the evidence or the circumstances in the case, was certainly a question for the determination of the jury. (Darby *v.* Callaghan, 16 *N. Y. R.*, 71.)

Motion for new trial denied, with \$10 costs.

AUDUBON *v.* THE EXCELSIOR FIRE INSURANCE COMPANY.

New York Common Pleas; Special Term, May, 1859.

TERMS ON OPENING DEFAULT.—DEFENCE OF FORMER ADJUDICATION.

On opening, upon sufficient excuse, a default regularly taken against the defendant, the court should not impose, as terms of the favor, a requirement that the defendant shall not interpose a defence of a former adjudication.

Such a defence is neither dishonest nor unconscionable.

The rule that on opening a default, the defendant may be restricted in his defences, should not be extended to defences other than those of usury, limitations, &c., which gave rise to the rule.

Motion to open a default. The plaintiffs resisted the granting of the motion, except with a restriction precluding defendants

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from interposing the answer of a Former Adjudication, the facts are stated in the opinion.

HILTON, J.—The defendants apply to have their default opened, and that they be permitted to answer.

It is conceded on the part of the plaintiff that a sufficient excuse is shown to entitle them to relief from the consequences of their neglect or omission to serve the answer within the proper time; but it is insisted that the peculiar circumstances of this case are such as call upon the court to restrict the defendants in respect to one of the defences proposed to be set up.

The action is upon a policy of insurance; or perhaps I should say, to establish that a policy was agreed on, and then to award the plaintiff such damages as he sustained by the burning of the property which he claims the defendants agreed to insure.

A similar action was heretofore, it seems, brought in this court, and tried before Judge Ingraham without a jury. Subsequent to the trial he filed his decision dismissing the complaint, which afterwards, and on motion on the part of the plaintiff, he changed into a nonsuit.

The defendants now desire to interpose this prior adjudication as a defence to the present action, and I am asked by the plaintiff to restrict them in so doing, so that they shall not be permitted to allege otherwise than that in such action a judgment of nonsuit was rendered.

This I cannot do. The rule that the court will never open a default, and relieve a party from the consequences of his own neglect, so as to enable him to set up an unconscientious or dishonest defence, cannot in my opinion be extended beyond the cases which gave rise to the rule itself, and to which it has been heretofore applied.

These cases are where the defence of usury, statute of limitations, or the like, have been attempted to be interposed after a default regularly taken. (Lorett *a.* Carman, 6 *Hill*, 223; Wolcott *a.* McFarland, *Ib.*, 227; Beach *a.* Fulton Bank, 3 *Wend.*, 585; Bates *a.* Vorhees, 7 *How. Pr. R.*, 235; King *a.* Merchants' Exchange Company, 2 *Sandf.*, 693.)

The defence intended in this case is substantially *res adjudicata*, and to restrict the averments in respect to it, and

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under which proof to maintain it may be offered at the trial, might, and probably would have the effect of altogether depriving the defendants of a defence which is neither dishonest nor unconscionable.

The defendants have leave to answer, upon payment of the costs of this motion.

GRAY v. KENDALL.

New York Superior Court; General Term, December, 1859.

PLEADING.—CREDITOR'S ACTION.—VERIFICATION.

In an action *in rem*, founded on the claims of plaintiff as a creditor—*e. g.*, an action to reach and distribute the assets of a limited partnership—the allegations of the complaint to show that the plaintiffs are creditors must be so definite and specific, as to inform the defendants when, in what manner, and by what contracts it is claimed that they became indebted to the plaintiffs.

The verification of a complaint, like that of an answer, should be united in by every party who unites in the pleading, and whose interest is several.

Appeal from an order requiring complaint to be amended.

The action was by Gray and others, on behalf of themselves and all other creditors, against the members of a limited partnership and their assignee under an assignment for the benefit of creditors, and it sought an accounting by the assignee, and an application of the assets, under direction of the court, to the claims of creditors.

The plaintiffs who appeared, and joined in the complaint, were several, not joint creditors. The only statement of their claims, as such creditors, which the complaint contained, was the following :

“That the plaintiff John A. C. Gray is a creditor of said firm of Ely, Bowen & McConnell, for the sum of fifty thousand dollars and upwards, on several promissory notes of said firm, made before the execution of said assignment.

“That the plaintiffs William C. Haggerty and Ogden Hag-

*approved & followed,
74 Jan 104, 115.*

gerty are creditors of said Ely, Bowen & McConnell, in the sum of nineteen hundred dollars and upwards.

“That the plaintiff David Wagstaff is a creditor of said Ely, Bowen & McConnell, in the sum of nine thousand dollars and upwards, on several promissory notes of said Ely, Bowen & McConnell, made before the execution of said assignment.”

The complaint was verified only by the plaintiff Gray, by an affidavit in the form usual in the case of a verification by one of several united in interest.

The defendants moved, at a special term, for an order requiring the complaint to be made more definite and certain in respect to the debts claimed by plaintiffs, and requiring that it be verified by each class of plaintiffs, or that the verification might be disregarded. The motion was granted, and an order made requiring, “that the complaint be made more specific, definite, and certain, by stating the nature and grounds of the alleged indebtedness of said Ely, Bowen & McConnell to the plaintiffs, severally; when such indebtedness was contracted, for what it was created, the date and particulars of any notes or bills given on account thereof, or that copies of such notes or bills be set forth in an amended complaint, so that said amended complaint shall show specifically the several causes of action which constitute said plaintiffs, severally, creditors of said Ely, Bowen & McConnell in the amounts named in said complaint, or in any other amounts, and that said complaint, when so amended, be verified by each class of said plaintiffs, or that said verifications be set aside and disregarded by the defendants in their answer to said amended complaint; defendants who make this motion to have twenty days to answer said amended complaint, after service of a copy thereof upon them.”

The plaintiffs appealed to the general term.

Buckham, Cady & Smales, for the appellants.

Geo. W. Parsons, for the respondents.—I. Where defects in a complaint are not of such a substantial nature as to be available under the ground of demurrer, that it does not state facts sufficient to constitute a cause of action, the remedy is by motion, under section 160, to strike out or make the faulty pleading more definite and certain. Such proceedings have taken the

place of demurrers for want of form. (Prindle *a.* Caruthers, 15 *N. Y. R.*, 425.) 1. It is claimed that the Code requires not merely *true propositions* to be stated, but physical facts, capable as such of being established by evidence, oral or documentary, and leave it for the court to draw the conclusions of law. (Lawrence *a.* Mann, 14 *How. Pr. R.*, 164; White *a.* Brown, *Ib.*, 284; *Code*, § 142, subd. 2.) 2. Also that *every* fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly stated. (Allen *a.* Patterson, 3 *Seld.*, 478; Eno *a.* Woodworth, 4 *Comst.*, 249; Page *a.* Boyd, 11 *How. Pr. R.*, 415; Howard *a.* Tiffany, 3 *Sandf.*, 690; Adams *a.* Holley, 11 *How. Pr. R.*, 326; Thomas *a.* Desmond, *Ib.*, 321.)

II. Judged of by the above rules, the complaint is clearly defective in not stating all the facts which constitute the several causes of action, which enable the plaintiff to maintain such an action against defendants. 1. It is not disputed that it is necessary that plaintiffs should severally be creditors, to have a standing in court in such an action. 2. How then can they escape the necessity of making proper averments of *facts* which will enable the *court* to conclude, as matter of *law*, that they are creditors? must they not, if disputed, prove *facts* which show them to be creditors? If so, then the rule established by the Court of Appeals, in the case of Allen *a.* Patterson (3 *Seld.*, 478), applies. They say, "Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly avowed or stated." 3. If this be true as to one of the claims, it must be true as to all of them, and it is not sufficient, as plaintiff seemed to suppose on the argument at special term, to show one valid claim belonging to each plaintiff, constituting him a creditor. It is admitted that the ownership of any valid claim over \$100, by the plaintiffs severally, would entitle them to bring this action, but having made claim to be creditors in certain specified amounts, they are bound to state facts which show them to be creditors in the amounts stated. 4. The question whether they are creditors or not is one upon which the defendants have a right to take issue, and it is impossible for them to do this without the averments required to be made by the order of the special term.

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III. It was necessary that the complaint should be verified by, or on behalf of each class of plaintiffs. 1. The plaintiff who did verify the complaint, could not possibly know that the allegations in the complaint, touching the claims and rights of his co-plaintiffs, were true, and we have a right to purge the conscience of each plaintiff or class of plaintiffs. 2. If their complaint is to be treated as a verified complaint, the oaths of the plaintiffs, several in interest, should be upon the record. 3. It has been repeatedly held that where different parties to a promissory note are sued together under the statute, even if the parties have a common defence, and join in their answer, the pleading must be verified by all the parties. (*Hull a. Ball*, 14 *How. Pr. R.*, 305; *Andrews a. Storms*, 5 *Sandf.*, 609; *Youngs a. Seeley*, 12 *How. Pr. R.*, 395.)

IV. The remedy by motion was the proper one, and the order of the special term should be affirmed with costs. (*Prindle a. Caruthers*, *supra*; *Hull a. Ball*, *supra*.)

BY THE COURT.*—BOSWORTH, Ch. J.—This action cannot be maintained unless the plaintiffs were, or unless some one of them was, a creditor of the limited partnership of Ely, Bowen & McConnell at the time it was commenced.

The allegations employed to show that they were such creditors should be sufficiently definite and specific to inform the defendants when, in what manner, and by what contracts of said firm, it is claimed that they became indebted to the plaintiffs severally, and in what amount.

It is as important in a suit like the present, as in one brought to recover a judgment *in personam*, that these particulars should be stated, in order that the defendants may set up by answer that said alleged demands have been paid or settled, or if no such demands ever existed, that issues may be formed by the pleadings which will show what claims must be proved to establish the fact that the plaintiffs were severally creditors, when this action was commenced.

This will not subject the plaintiffs to any inconvenience which is not common to all plaintiffs who institute an action, and claim

* Present, BOSWORTH, Ch. J., WOODRUFF and MONCRIEF, JJ.

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relief on the ground that the defendants, or some of them, are their debtors.

To allow the plaintiffs in the present case to state less than this in their complaint, will expose the defendants to the hazard of having notes made by them produced and offered in evidence at the trial, which the plaintiffs do not now own, or to which there may be a good defence, without its being in their power to establish these facts; and that solely because the complaint does not enable them to know what are the notes or causes of action which the plaintiffs intend to prove, to show that they are such creditors as the complaint alleges.

We know of no rule of pleading, nor of any precedent, which sanctions a complaint like the present, in respect to that portion of it to which the order appealed from relates.

In respect to so much of the order as relates to the verification of the amended complaint, it is sufficient to say that the same rule applies to that as to an answer.

When any pleading is verified, "it must be by the affidavit of the party, or if there be several parties united in interest and pleading together, by at least one of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit." (*Code*, §§ 156, 157 [133, 134].) It is provided by statute that whenever, in any statute, any "party or person is described or referred to by words importing the singular number," several persons shall be deemed to be included. (2 *Rev. Stats.*, 2d ed., 778, § 11.)

When the Code requires the verification to be made by the affidavit of the party, it requires the affidavit to be made by every party who unites in such pleading whose interest is several. If this be not done, the adverse party should not be required to treat it as a pleading verified as the Code requires.

The rule has been applied to answers in which several persons not united in interest have joined. There is no reason why it should not be applied to a complaint in an action commenced by several persons as plaintiffs who are not united in interest. At all events, the Code does not discriminate between them, but, on the contrary, applies the same rule to both.

The order should be so modified as not to require any of the plaintiffs, whose demands consist in whole or in part of promissory notes made by the limited partnership, to do more in re-

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spect thereto than to describe such notes accurately, or to set forth copies of them. In other respects, it should be affirmed.

Order accordingly.

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Supreme Court, First District; General Term, Jan., 1860.

CONSTRUCTION OF PLEADINGS.—STATUTORY CAUSE OF ACTION.— ACT OR NEGLIGENCE IN ANOTHER STATE, CAUSING DEATH.

The provisions of the acts of 1847 and 1849 (*Laws of 1847, 575; Laws of 1849, 388*)—giving an action to the personal representatives of persons killed by the act or neglect of others—do not extend to the case of a death caused without this State.*

If place is material to be alleged, and the pleading is ambiguous as to the place, the presumption is against the pleader.

Appeal from order overruling demurrer to complaint.

This action was brought under the acts of 1847 and 1849, to recover damages resulting from the death of John C. Beach, caused by an explosion or escape of steam on board the defendants' steamboat, the Empire State, while on her passage from Fall River to the city of New York, the deceased being a passenger on board of said boat.

The complaint alleged that he was at the time a resident of the city of New York; that the defendant was a corporation of Massachusetts; that the deceased paid his fare and took passage at Fall River for New York; and that the explosion or escape of steam which caused the death, took place through the wrongful act, neglect, and default of the defendants and their agents and servants.

The defendants demurred to the complaint, substantially upon the ground that it is not alleged in the complaint, nor does it appear therefrom, that the act or acts complained of occurred within the State of New York.

* To the same effect is *Vanderwerken v. N. Y. & New Haven R. R. Co.* (6 *Ante*, 239). Compare *Molony v. Dows* (8 *Ante*, 316).

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The judge at special term, in deciding the demurrer, assumed that the death, and disaster occasioning it, did not take place within the State of New York; he nevertheless held that the action was well brought, and overruled the demurrer. The case at special term is fully reported, 6 *Ante*, 415.

From this judgment the defendants appealed.

D. D. Lord and *Daniel Lord*, for the appellants.—I. By the common law no right exists to recover for an injury causing death, in the name of the representatives. The right is the creature of statute, and to create it the Legislature must have had jurisdiction to create it, and also must have intended to exercise it in the case presented. The defendants deny both these propositions.

II. The Legislature of New York has no extra territorial jurisdiction to create, either rights or remedies from acts done abroad. 1. This is a very different question from that, whether a State court can try an injury, resting on common-law principles, committed extra territorially. 2. The Legislature cannot give to acts done without its territory any effect beyond what the common law gives them. 3. It could not give to an act done in Massachusetts, the character of a crime (see cases *infra*), nor a consequence by way of statutory damages, which the common law does not give. 4. Nor damages for an act done there, when none are given by the common law; nor could it give the damages for such an act to other persons than to those to whom they are given by the common law. To do any of these things is to usurp a power of legislation, the ultimate act of sovereignty, with no sovereignty over the place or the party. (See on extra territorial inoperativeness of laws, *Story on Conflict*, &c., §§ 7, 8, 20, 21, 22, and its citations; *Sedgw. on Stat.*, 69, 70; *Blanchard v. Russell*, 13 *Mass.*, 1; *Commonwealth v. Clary*, 8 *Ib.*, 264; *Scoville v. Canfield*, 14 *Johns.*, 338; *Bank of Augusta v. Earle*, 13 *Pet.*, 519; the reasoning in *People v. Adams*, 3 *Den.*, 190, and 1 *Const.*, 173; *People v. Rathbun*, 21 *Wend.*, 509.)

III. 1. The supposable exception of the operation of the statute of a State on the acts of its citizens transiently abroad, by reason of their allegiance, is inapplicable: for the defendants here were a Massachusetts person. (*Covington Drawbridge*

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Company *v.* Shipherd, 20 *How. (U. S.)*, 227, and cases there reviewed.) The vessel was a Massachusetts vessel. 2. The present is not the case of a right, under the general common law, occurred abroad and sought to be tried here, but is one where there was no right by the common law: and the whole question is on the effect of a statute to create a right without its jurisdiction.

IV. To affirm that the Legislature of one State or country, in order to protect its citizens, could, if it meant so to do, legislate as to acts done without its limits, is without the precedent of any authority, and contrary to universally admitted first principles. 1. If such a right rests on the power to protect its citizens, it would warrant its exercise by giving criminal remedies as well as by enlarging civil remedies: but confessedly it does not. 2. Such a right might introduce new remedies into all the foreign navigation from abroad to this State. 3. Such a right would be, on the same principle, applicable to acts happening between Dover and Calais; for the action at common law, where a right of action subsists, is transitory. 4. It could give a civil remedy by act of parliament of England for libels published in New York, against subjects of England.

V. It is erroneous to hold, because the action on a claim existing at the common law arising abroad is transitory, and the courts of all countries where the defendant may be found have a forensic jurisdiction to try it, that the legislative jurisdiction to create new rights is migratory and universal. Nor is the error remedied by holding that the statute, if remedial, could have extra territorial operation: its being remedial or penal is of no consequence unless there be legislative jurisdiction. The present judgment is without precedent. It is expressly contrary to *Whitford v. The Panama Railroad Company*, in the Superior Court, 3 *Bosw.*, 67.

VI. But even supposing that the Legislature of New York could give a new right in respect of an extra territorial act—yet by a sound construction of the act of 1849, that act only applied to deaths within this State. 1. As statutes are to be presumed not retroactive unless made so by express terms, so they are to be presumed not to import extra territorial operation: but to import a reference to acts within its territory. Merely general terms do not import retroactive effect. (*Sedgw. on Stat.*, 188;

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Moon *v.* Durdon, 2 *Exch. R.*, 22; Tillman *v.* Lansing, 4 *Johns.*, 45; Dash *v.* Van Kleeck, 7 *Id.*, 497; Johnson *v.* Burrill, 2 *Hill*, 238.) 2. The railways and rivers of this State afforded sufficient scope, motive, and operation for the statute, so that it is not necessary to suppose the intent of extra territorial legislation. 3. Although the act in question be remedial and penal both, yet as the new remedy against the owner, was accompanied by compensating penalties to protect him, the burden will not be extended by construction beyond the protection. 4. The neglects, &c., contemplated in the penal and remedial parts are the same neglects, &c. The two parts of the statute were not intended to apply to different subjects; and as the penal part is limited by the territorial jurisdiction, the remedial part is merely co-extensive. 5. The act of 1849 was in ease of the carrier, and a modification of the previous law in his favor. The intent should be carried out by the construction contended for by the defendants. 6. The principle of comity, by which the *lex loci actus* is applied, forbids the extra territorial effect of legislation: it rests on giving effect to the law of each country in other countries.

A. Mann, Jr., for the respondents, in addition to the points made below (6 *Ante*, 415), argued the following:—XVI. It cannot be that a foreign corporation can locate itself for the purpose of business in a State foreign to that of its creation, enjoying all the protection and advantages arising from that location, and owe no obedience to the laws of that State, and subject to no obligations in reciprocation of the advantages it enjoys. If the body of the corporation cannot be reached, *its property within the territorial limits of the State, whose laws it has violated, can be reached by attachment or by an action at law, and to this extent*, if to no other, it must be amenable to those laws, the same as a natural person, and in that way these corporations are subject to the laws and jurisdiction of the State.

Although citizens or foreigners doing business in a State leave the State, their obligations to the laws of the State, as well as under their contracts made in the State still continue, and their property in the State is liable to their performance, or themselves to action, when returning to the jurisdiction. This is the prin-

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ciple which is involved in the jurisdiction, obtained by advertising absent debtors or contractors.

XVII. If the Legislature can, according to the above principle, pass criminal laws necessary to the protection of its citizens and the preservation of the peace and prosperity of the State, which will reach parties, residents of the State going out of it, to commit an act which would contravene those laws, it may pass an act of a lesser character, like those on which this action is founded, for the recovery of damages for an injury in contravention of those laws, to be recovered of the defendant under the circumstances of this case. The Legislature of the State of New York has acted in pursuance of this principle, in the acts passed against duelling or sending of challenges, by residents of this State going out of the State for the purpose. (See 2 *Rev. Stats.*, 4th ed., 843, 869.)

XVIII. The defendant having a *quasi* residence within the State of New York, at the time of the disaster charged, it is liable to damages to the citizens of the State arising from the business which the defendant conducts within the State during that residence, although the immediate act causing the injury happened out of the State, but with which the defendant was legally connected. While doing business there, it acts in reference to those laws.

XIX. The loss of maintenance and support on the part of the widow, the plaintiff, is certainly a pecuniary damage to the extent of losing the cost of that maintenance and support; and as to the other next of kin, the value of the talents, services, and support afforded them by deceased, is equally a pecuniary damage. (See *Oldfield a. Harlem Railroad Company*, 4 *Kern.*, 310.)

XX. The court having jurisdiction of the person, or of the defendant, could compel him or it to transfer land lying in another State. The defendant being bound by the *quasi* contract arising out of the acts of the Legislature, and doing business in the State under them, the court can compel it to respond in damages provided by the acts. (*Baily a. Ryder*, *Ct. of Appeals*, Dec., 1852.)

XXI. It is undisputed, that the State may make laws binding the property within the State, of foreigners beyond it. This action is a means of obtaining that property of the defendant,

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which is within the State, if nothing more, for the purpose of answering the damages given by the statute. (*Story's Confl. of Laws*, 452, § 541, ed. 1834.)

XXII. The necessities of the public general welfare, and the regards of civil commerce, have introduced exceptions to the rule, that laws made by a sovereign have no force or authority except within the limits of his dominions. (*Story's Confl. of Laws*, 8, § 7; 1 *Boullenois's Prin. Gen.*, 4, 6.)

XXV. Actions for torts, when arising out of matters of contract, as actions for negligence, are subject to all the incidents of actions *ex contractu*. In connection with the points as to personal actions, the following authorities may be consulted: Courts of common law have concurrent jurisdiction with Courts of Admiralty of marine torts, as in trespass for collision on the high seas. (*Percival a. Hickey*, 18 *Johns.*, 257, per SPENCER, Ch. J.) So for an assault and battery by and between British subjects. (*Gardner a. Thomas*, 14 *Johns.*, 134.) The State courts have jurisdiction of personal wrongs committed by a superior upon an inferior while at sea and engaged in the public service. (*Wilson a. McKenzie*, 7 *Hill*, 95.)

BY THE COURT.*—SUTHERLAND, J.—I think it is to be assumed, in deciding whether the demurrer is well taken, as was done by the judge at special term, that the explosion and death did not occur within the State of New York.

If the place is material, and the pleading is ambiguous as to the place, the presumption should be against the party whose pleading it is. (*Cruger a. Hudson Riv. R. R. Co.*, 2 *Kern.*, 201.)

It necessarily results from the independent sovereignty of different states or nations, that the laws of one state or nation can have no force or effect without its own territorial limits, and within the territory of another state or nation, without the consent of the latter. Sovereignty is exclusive and absolute, except so far as it may be qualified by treaty or consent. If the legislatures of two states or nations could pass laws for each other, to be enforced, *proprio vigore*, within the territorial limits of each other, both nations would instantly cease to be sovereign. The passage of laws is the highest act of sovereignty. Each in-

* Present, ROOSEVELT, CLERKE, and SUTHERLAND, JJ.

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dependent nation or country has the same right to pass laws. It necessarily follows that the laws of a state or country "can have no intrinsic force *proprio vigore*, except within the territorial limits and jurisdiction of that country." (*Story's Confl. of Laws*, §§ 7, 8.)

In the United States, the sovereignty of the several States is modified by the constitution of the United States, adopted by them; but irrespective of the constitution of the United States, the several States are independent sovereignties with respect to each other and other countries, and the foregoing principle of the territorial limitation of legislative power or jurisdiction applies to them.

The well-known distinction between the *lex loci contractus* and the *lex fori*, and between transitory and local actions, taken and recognized in construing and enforcing laws, assumes and is founded on this state or national territorial legislative limitation. (4 *Cow.*, 510, *note*.)

Personal injuries or torts are transitory, *et sequuntur forum rei*. (Rafael *v.* Develst, 2 *W. Blackst.*, 1058; Mostyn *v.* Fabrigas, *Cowp.*, 161-176.)

A party who has suffered a personal injury or tort in another country or state and comes here, brings with him his cause of action for the injury or tort, and if he finds the party who committed the injury or tort in such other country or state here, can sue him here; but it is presumed that in ordinary cases he can do so only upon the ground that he brought his cause of action with him; that is, that the act or acts of the defendant, by which the injury or wrong was effected, were unlawful when and where committed; in other words, that the injury or tort complained of here, was an injury or tort by the law of the country or state when and where committed.

In such cases, the courts of one country or state give a remedy upon the principle of comity for personal injuries and wrongs suffered in another, but they must be injuries or wrongs by the law of the state or country in which they were suffered.

The common law gives a remedy for personal injuries or torts, whether direct or consequential. In actions brought here for injuries or torts committed in another country or state where the common law is presumed to prevail, the court here gives the common-law remedies for such injuries and torts, upon the pre-

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sumption that the common law does prevail in such other country or state, and, therefore, that the plaintiff had a right of action or remedy there, for the injury or tort committed there.

To apply this principle to this case: if the explosion took place in the State of Massachusetts, and John C. Beach, the deceased, had survived the injuries, and had brought his action here, against any of the defendants' agents or servants, through whose default or neglect the explosion occurred, whom he could find here, he could have recovered here, upon the presumption that the common law does prevail in Massachusetts, and because the common law prevailing in Massachusetts he could have recovered there, had the action been brought there.

But John C. Beach did not survive the injuries, and this action is brought by his personal representative, under special acts of the Legislature of this State giving a right of action or remedy unknown to the common law, not for the injuries suffered by John C. Beach, but for the damages and pecuniary injuries resulting from his death suffered by his widow and next of kin—damages and injuries not the subject of judicial cognizance or of legal redress by the common law, and for which, therefore, it is to be presumed no action could be brought in Massachusetts.

It is quite immaterial whether those sections of the acts giving this right of action are penal or remedial.

The remedy, in fact, is an extraordinary one, unknown to the common law, created by the acts, for damages or injuries also created by the acts; for in a legal or judicial sense, damages or injuries for which there is no legal redress or remedy, are not damages or injuries. These acts which create the remedy for the benefit of the widow and next of kin, *also create the wrong as to them.*

Assuming that the wrongful act, neglect, or default, explosion and death, took place in Massachusetts, in the absence of any law of that State giving a remedy to the widow and next of kin or for their benefit, in a legal sense they cannot be said to have suffered any wrong or injury from the act, neglect, or default, &c., unless the acts of this State, under which this action is brought, extended into and were in force in Massachusetts—for act or acts complained of as tortious or wrongful must be tortious and wrongful when and where committed; at all events, neither the return of the agents or servants of the defendants through

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whose neglect or carelessness the explosion took place into this State, nor the voluntary appearance of the defendants in this action, would make the act or acts committed in Massachusetts originally tortious, or give the widow and next of kin of the deceased the benefit of the remedy provided for by the acts of 1847 and 1849.

The learned judge who decided this demurrer at special term commences his opinion by saying: "It cannot be denied that one state or nation has a right to give its citizens redress for any personal injury committed without as well as within its territorial limits, when it obtains jurisdiction over the wrong-doer. This has always been recognized in the common law. Many, if not most of the actions instituted in our courts of justice, are transitory, and not local; and if the cause upon which any one of them is founded arose in Japan, it would be just as tenable as if it arose in the State of New York."

I think the question raised by the demurrer in this case is not a question of legislative power, but a question of interpretation.

It is not a question as to the power of the Legislature which passed the acts of 1847 and 1849, but as to the intent of the Legislature in passing them. The question is not, whether the court has jurisdiction of the parties and of the cause of action, assuming the action to be for an injury or tort committed in Massachusetts, or without the political jurisdiction of the State; but the question is, whether the act or acts complained of, which caused the death of John C. Beach, and thus consequentially the alleged damages for which the action is brought, were tortious by *these acts of the Legislature of this State*, and did or could, in a legal sense, cause any damage or injury *to the widow and next of kin*, for which an action can be brought *under these acts of the Legislature of this State*, assuming that the act or acts, negligence or default, complained of as causing the death of John C. Beach, were committed or occurred in Massachusetts, or out of this State, and within the jurisdiction of another State. In other words, I think the question raised by the demurrer is, whether it appears from the complaint that the plaintiff has a cause of action under the acts of 1847 and 1849; not whether the Legislature of this State could have given him one; or, if he has one, whether the court has jurisdiction of it.

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Now it is very clear that the general proposition stated in the opinion of the learned judge at special term, that a state or nation has a right to give its citizens redress for injuries committed without as well as within its territorial jurisdiction, where it obtains jurisdiction over the wrong-doer, however true, has little or no bearing on the question in this case, viewing that question as one merely of the interpretation of the acts of 1847 and 1849. Indeed, the learned judge, by stating that proposition, and the other immediately following it as to transitory actions, as bearing on the question in this case, would appear at the very commencement of his opinion to have assumed that the act or acts, negligence or default, complained of as causing consequentially the injury and damages to the widow and next of kin, for which the action is brought, were tortious and did cause such injury and damages, under and by force of these special acts of the Legislature of New York; the very question in the case being, as I have before stated, whether the act or acts, &c., having been committed out of this State and within another State, were or could be tortious under and by force of these statutes of New York, or did or could cause any injury or damage to the widow and next of kin, for which a remedy was intended to be given by these statutes.

“Every nation has an exclusive right to regulate persons and things within its own territory.” (*Story's Conf. of Laws*, § 22.)

Irrespective of written constitutions, and of limitations which may be implied from the formation and frame of the government, the legislature of a state may be said to have sovereign power over persons and things within its territory. It would have the power of preventing foreigners who had committed certain acts in their own country from coming into the state. It would have power to prevent citizens of the state, who had committed certain prohibited acts in another country from returning to the state.

If the Legislature of this State should do so extraordinary a thing as to pass a law giving the personal representatives of an Englishman or of a Frenchman, who had been killed in a duel in his own country, a right of action here against the party killing him, for damages for the benefit of the widow and next of kin of the deceased, such law could of course only be enforced against the person or property of the person committing the act,

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if he should happen to come into the State or have property here; but if the party committing the act should choose to come into this State, and should be sued under the act, it would be difficult to say that the case would necessarily present a question of jurisdiction for the court.

Laws of this description, undertaking in a certain way to regulate the conduct of foreigners in their own country, under the penalty of being enforced on their coming into the country passing the laws, might present questions of war, but could not very well present questions of jurisdiction.

A nation may undertake to regulate by law the conduct of its citizens while abroad in another country, to be enforced on their return to their own country, but such laws are really consistent with the almost self-evident proposition, that the laws of one nation or state can have no force in the territory of another, without the consent of the latter. As a state or nation "has an exclusive right to regulate persons and things within its own territory" only, it is to be presumed, whatever power it may have to regulate the property and conduct of its citizens in the territory of another state or nation with the consent of the latter, or to be enforced only on persons and property within its own jurisdiction, that its laws are and were intended to be regulations for persons and things within its own territory only.

There is nothing in these acts of 1847 and 1849 which shows that they were intended to protect the lives of its citizens while out of the State—nothing to show that they were intended to extend to act or acts, neglects or defaults, committed or suffered in another State.

It must be presumed, I think, as the result of the general principles of the territorial limit of political jurisdiction, and of the force of laws before adverted to, that these statutes were intended to regulate the conduct of corporations, their agents, engineers, &c., and of other persons, while operating or being in this State only. *

If a citizen of this State leaves it, and goes into another State, he is left to the protection of the law of the latter State.

One section of the law of 1849 is highly penal.

For the same wrongful act, neglect or default, for which the statutes give the civil remedy to the personal representatives of the deceased for the benefit of his widow and next of kin, the

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statute of 1859 renders the party who commits the act, &c., liable to indictment and imprisonment in a State prison.

Penal actions and proceeding are strictly local.

Can it be presumed, that the Legislature intended, for the purposes of the civil remedy, to include act or acts, neglects or defaults, not intended to be the subjects of the criminal proceeding.

Upon the whole it is quite clear to me, that it was not intended by these statutes to make the act or acts, neglect or default, complained of in this case, which it must be assumed occurred out of this State and within the jurisdiction of another State, the subject of the civil remedy given by the statutes; and that therefore the complaint in this case does not show any cause of action under these statutes; and that the judgment at special term should be reversed; and that the defendant should have judgment on the demurrer.

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New York Superior Court, General Term, December, 1859.

ATTACHMENTS.—LEVIABLE PROPERTY.—CONSIGNOR AND CONSIGNEE.

A non-resident debtor having shipped goods to his factor within this State, a creditor issued an attachment, under the Code of Procedure, against the property of the debtor, and served the same on the factor after the bills of lading were received, but before the goods had come within the county. The factor at the time was largely in advance to the consignor, but he had in hands goods, and notes received for goods sold, to an amount exceeding the attachment, the proceeds of which, together with the proceeds of goods represented by the bills of lading, which latter subsequently arrived, were more than enough to pay his balance. After the latter goods had arrived and the balance of account turned in favor of the debtor, another creditor issued a similar attachment, and served it upon the same factor.

Held, that as between these creditors the first attachment was entitled to priority of payment. There was property of the defendant in goods and notes, in the hands of the factor at the time of the attachment, and the factor alone could assert his lien to the defeat of the attachment; and the amount of his

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lien having been subsequently paid, the surplus was left bound by the attachment.

It seems, that whatever may be taken on execution, may be taken on an attachment issued under the Code of Procedure.

It seems, that a bill of lading in the hands of the consignee is not property of the consignor within the meaning of section 464 of the Code.

The right of a consignee in advance to his consignor, to property on hand, or to a bill of lading made in his name, is a qualified property commensurate with, and to support his lien, and no more.

Appeal by several defendants from a judgment awarding a fund to the other defendants.

This action was brought by the plaintiff as administrator of Albert Lewis, deceased, who had consigned goods to the defendant Perry for sale, and it sought an accounting and payment of the balance due. Other parties were made defendants on allegations that they claimed liens on the balance by virtue of attachments, the validity of which the plaintiff contested. The defendant Perry paid into court the balance due from him, and was discharged from the action, and the other defendants who claimed the fund under their respective attachments against the property of the deceased, were required to interplead.

The facts on which the questions arose were substantially as follows :

Prior to April 1, 1854, Albert Lewis of Cincinnati, having advanced largely to his brother on provisions, and having the possession and right of sale in consequence, was in the habit of shipping them from time to time, and forwarding bills of lading to Samuel Perry of New York, for sale on commission, who made advances from time to time, keeping a general account with Lewis. On April 1, 1854, the balance of account was against Lewis, part only of the goods previously shipped having arrived in New York, though all the bills of lading had come to hand. On or about April 1st, Lewis shipped another lot of provisions at Cincinnati, and the bills of lading of this lot were received by Perry, April 5, 1854.

The same day (April 5th), after the bills of lading of this last lot had thus been received, a copy of attachment and notice was served on Perry on behalf of White, Warner & White, credi-

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tors of Lewis. Perry paid freight, &c., on this last lot of goods, but becoming alarmed in consequence of the attachment, refused thenceforward to accept Lewis's drafts, or to make further advances. The remainder of the goods shipped before April 1st, as well as those comprised in this last lot shipped on the first, continued to arrive from time to time, during the latter part of April, May, and the first part of June, and had all, or nearly all, arrived in New York by June 15th, 1854, on which day a copy attachment and notice was served on Perry on behalf of Milne & Reid, also creditors of Lewis. No attempt was made by the sheriff to take possession of the goods under either attachment, no inventory was made and no certificate was obtained. Perry continued selling the goods and repaying himself his advances, commissions, freight, and charges, the sales extending into September, 1854. No separation or discrimination was made between the parcels as sold from time to time, and no separate account of sales was kept, but the proceeds went into a general account between Perry and Lewis, resulting in a balance in favor of Lewis.

The court at special term held that the plaintiff's claim was not sustained, and awarded the fund to the creditors whose attachment was last issued. The other creditors appealed.

S. W. Roosevelt, for the appellant.—I. It is the opinion of the court below, that the fund in dispute was chiefly produced by the sale of the last lot of goods, and that Perry had paid charges, but had not made advances on this last lot specifically. It appears, however, from Perry's accounts, which are in evidence, to have been the course of dealing between Lewis and Perry, not to discriminate among the various lots, but to sell a portion of one with another as suited the market, not keeping separate accounts with each lot, and if one lot did not fully repay advances, the next lot was sold to meet the deficiency, and such indeed is of necessity the general custom among commission merchants. It is therefore difficult to ascertain as a matter of fact, which of the lots *per se* may fairly be said to have produced the fund in dispute. It appears to be conceded by all parties, however, that Perry was consignee of all the goods, and in possession of the bills of lading, with the right to sell the whole in order to pay himself advances, commissions, and expenses, and he did sell

the whole accordingly. No attempt was made under either of the rival attachments, to take possession of the goods or interfere with Perry's sales, and nothing was done by the sheriff beyond the service of copy and notice, and the court finds that the last lot was subject to Perry's advances, which were a balance of advances not repaid by the proceeds of the previous lots.

II. Under these circumstances, the presence of the goods in the county cannot affect the priority of the attachments, as between these defendants. The sheriff cannot take possession of goods so consigned (*Brownell v. Carnley*, 3 *Duer*, 9), and, in fact, he did not take possession. When no levy can be made on goods under an attachment, their precise location, at a given moment, is both theoretically and practically of little importance, and can certainly not settle priorities.

III. Neither of the attachments, therefore, could in law, or did in fact, reach the goods, nor can either be said to have reached the interest of the consignor in the goods. The interest of a party in goods, as such, cannot be considered as attached, when the creditor is not enabled, by force of the writ, directly or indirectly, to take possession of or control the property. Perry, the consignee, might rightfully have sold all the goods before they came into the county, and had, in all respects, complete control. The attachment of White, Warner & Co., has priority, because—1. Under neither attachment was any levy or inventory made, or possession taken of the goods. 2. Under both the inchoate indebtedness of Perry to Lewis was attached in the order of service.

IV. A levy under any attachment should inure to the benefit of a former attachment by statute, by analogy with executions at common law, and as a matter of sound policy. (*Leak v. Tiffany*, 2 *Comst.*, 450, 457; *Ray v. Birdseye*, 5 *Den.*, 624, 625; *Solomon v. Freeman*, 4 *Sandf. Ch.*, 515; 3 *Rev. Stats.*, 5th ed., 645, § 15, 336; *Code*, § 232; 12 *Johns.*, 403.)

V. Lewis was not himself owner, but was consignee or pledgee, having made advances, and, therefore, possessing a lien which he transferred to Perry by the bills of lading: and this fact removes the goods, as goods, still further out of the scope of the attachment, and renders the interest of Lewis more plainly such a claim, as when assigned to Perry, was subject forthwith to attachment without reference to the location of the goods.

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G. C. Goddard, for the respondents.—I. The attachment of White had no *prospective* operation, so as to reach property coming into the county, and into Perry's hands, *after the service of it*. It was served on the 6th of April, and at no subsequent time. By the terms of the Code, and by the nature of the writ of attachment, no property is reached by it, except that in the county and on hand when it is served. (*Code*, §§ 231, 232, 235, 236, 240, 241; *Rev. Stat.*, vol. 2, 2d ed., 4, §§ 7, 8, 28–34; *Learned a. Vandenburg*, 7 *How. Pr. R.*, 379; *S. C.*, 8 *Ib.*, 77.) Attachments in other States are analogous. (*Fitch a. Waite*, 5 *Conn. R.*, 122; *Lane a. Jackson*, 5 *Mass.*, 162.) In this respect, attachments are unlike executions, which take effect by delivery to the sheriff, except against *bona-fide* purchasers for value.

II. The bills of lading being in Perry's hands, did not subject to the attachment property on the Ohio River, or elsewhere, on its way to New York. They are merely evidence of *Perry's* having some interest in the property, but have no effect to bring the property within the reach of the sheriff. As to that shipped on the 1st of April, Perry had then no interest in it, not having advanced or paid any thing on it. (*Grant a. Shaw*, 16 *Mass.*, 341.)

III. Perry had a *specific* lien for his advances and charges on all the property, except that shipped on the 1st of April; on which last he refused to advance. As against *Milne & Co.*, had the question arisen, Perry would have been bound to look first to the property on which he had such *specific* lien. But the funds in court, are found, in fact, to arise from the property received after April 6, and chiefly from that shipped on the 1st of April.

BY THE COURT.*—HOFFMAN, J.—The counsel for the appellants insist that an addition should be made to the finding of facts, which is warranted by the evidence, and will modify one conclusion of fact actually found, and affect the conclusion of law arrived at by the judge below. It relates to the state of the accounts between Perry and Albert Lewis generally, and particularly at the time of the reception of the bills of lading of the last parcels of the goods consigned.

* Present, HOFFMAN, PIERREPONT, and MONCRIEF, JJ.

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An analysis of the accounts of Perry contained in the case, presents these results: On the 6th day of April, 1854, Perry was a creditor of A. Lewis in the sum of about \$38,000. This balance was due for acceptances outstanding, maturing in May, June, and July, none before the 28th day of May, 1854. The sales which had then been made, were credited when made, although the time of credit given on such sales was not yet expired, or the notes taken not yet matured.

On the said 6th day of April there were some goods in Perry's hands unsold, of a value greatly less than the balance due him. There were also unpaid and immature notes in his hands exceeding \$8000, given upon purchases of the produce.

On the said 6th day of April, bills of lading were in the hands of Perry, with letters of consignment, for goods to the amount of over \$47,000.

Between the 6th day of April and the 15th day of June, the goods thus consigned arrived and came to Perry's hands. These consisted of two classes of produce: *first*, those received from April the 8th to June the 11th, which were received (except an inconsiderable portion) by the 5th day of May; and, *second*, the parcels which arrived from the 16th day of April to the 9th day of May, and the invoice price of which was \$8548.98. On the 15th day of June, the account stood with a credit-balance in Perry's favor of \$5416.67, which was overpaid by the 17th day of June, and Perry became a debtor in \$1350.83.

The subsequent receipts from sales, that is, after the 17th day of June, amounted to \$8143.13, and the subsequent charges to \$2666.86, leaving a balance of \$5476.27 on this account, and a total balance against Perry as of September the 1st, 1854, of \$6827.10. By the account-current it is \$6896.62.

The consignment, with the bills of lading of the particular produce shipped on the 1st day of April, and mentioned in the letter of that date, and the amount of which was \$8548.98, was sold indiscriminately with other parcels of produce of the same kind. No separation was made of the parcels. The judge has found that the fund in dispute was principally produced by the sale of these specific parcels of produce. With the exception of 139 barrels of rump-pork, we do not think his conclusion supported by the evidence.

Another fact is deducible from the evidence, viz., that of Per-

ry's acceptances, over \$10,000 fell due after the 30th day of June, 1854. On that day there was in his hands, in cash, from sales, over \$6000, and for unsold goods and unpaid notes, over \$10,000 more.

The first important question is, whether an attachment will bind goods received by a consignee subsequent to its service, when the consignee had at the time of notice the bill of lading in his hands, with advice of the consignments, the goods being out of the county, but on their passage from a foreign place. And this question arises as between such attaching creditor and a subsequent one attaching after the goods had arrived within the county, and when they or their avails were in the consignee's hands.

The answer to this question in the affirmative would dispense with the necessity of examining any other point, and decide the case in favor of the appellant. I think, however, that this simple and unmixed question cannot be so answered.

Section 227 of the Code provides, that a plaintiff may have the *property* of the defendant attached in the manner prescribed, as a security for the satisfaction of such judgment as may be recovered by the plaintiff. By section 231, the warrant is to be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand. Several warrants may be issued at the same time to the sheriffs of different counties. So by section 234, all property in this State, of a defendant, is liable to be attached and levied upon, and sold to satisfy the judgment.

Thus, under the Code, the property which may be attached is, first, property as defined therein; and, next, that property when found in the State. If in the State, then the warrant must go to the sheriff of the county in which it is found.

Thus the question is reduced to this: was the bill of lading in Perry's hands *property*, within the meaning of the Code? If it was, then it was within the county of the sheriff of New York.

The definition of property in section 464 of the Code is, that it includes property, real and personal; and the definition of personal property is, "money, goods, chattels, things in action, and evidences of debt."

It seems impossible to understand how a bill of lading, after it is in the hands of the consignee, is a thing in action belonging to the consignor named in it, or an evidence of a debt owing to him. It is a symbolical transfer to the consignee of the property, and of a right of action against the carrier. It contains no evidence that the consignee is indebted to the consignor.

The two cases in Massachusetts, of *Grant v. Shaw* (16 *Mass.* 341), and *Andrews v. Ludlow* (5 *Pick.*, 28), are exactly in point, unless there exists a distinction upon any peculiar different provisions in the statutes of that State. Section 24 of the revised act of 1836 (*Laws of Mass.*, ch. 90, 549) provides, that all goods and chattels that are liable to be taken in execution may be attached and held as security, except such as, from their nature or situation, have been considered as exempt from attachment, according to the principles of the common law, as adopted and practised in this State.

By section 19 of chapter 97, title 3, part 3, p. 589, "all chattels, real or personal, and all other goods that are by the common law liable to be taken in execution, may be taken and sold thereon," with certain exceptions.

It appears to me that there is nothing in the statutes of Massachusetts differing from our own definition of property, which may give rise to any doubt of the pertinency of the cases referred to, unless it be that a bill of lading is a *chose in action*, or *evidence of a debt*, belonging to the consignor. This, I have before stated, does not seem to be a tenable proposition.

The case of *Grant v. Shaw* decides expressly that one who has received a bill of lading and invoice of goods consigned to him, cannot be charged, as trustee of the consignor, until the goods have arrived, and the consignment has been accepted. An attachment laid when the bill of lading only was on hand, was superseded by a subsequent attachment laid after the goods had arrived. I notice that in the forms in evidence, the sheriff is directed to attach all property within, or which may thereafter come within, his county. I do not think this practice can vary the view now presented, if it is at all warranted.

2. But the question as presented upon the peculiar facts of this case is different, and of no little interest and concern in this mercantile community. When the attachment of the appellants was served on the 6th day of April, Perry had on hand an ag-

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gregate of goods, notes given for goods, and bills of lading representing goods on the way to him and subsequently received, more than enough to discharge all his demands, including immature acceptances, and to leave a balance equal to the amount claimed by these attaching creditors. Again, the remaining goods, and the unpaid notes then in hand, exceeded the amount of the demand of the appellants.

It is stated as a rule of law, that the attachment may be defeated by the lien of the garnishee upon the goods of the defendant, provided it be to the full amount of the value of the goods attached. If it be not to the full extent of the value, then the judgment is taken for the goods subject to the garnishee's lien, which must be ascertained from the garnishee, or at the trial. (*Locke on Attachments*, 57. He cites *Giles v. Northam*, *infra*; and *Bohun's Privileges of London*, 270.)

In *Giles v. Northam* (5 *Taunton R.*, 558), cited by Mr. Locke, it was held, that the property in a cargo for which the master had signed bills of lading, might be transferred by delivery, without the indorsement of the bills of lading. The title would be subject to the claim of a *bona-fide* indorsee of the bill of lading. But whether such property passed or not, Northam, the consignee, had a lien upon the cargo for advances, and no creditor of the owner could attach it, or the produce of it, without discharging such lien. "Without doing this, Levin himself (the owner) could not have recovered it; and they who attached property as belonging to Levin, could not have a larger right than he possessed before the attachment. Supposing, therefore, that in the interval between the delivery of the cargo and the indorsement of the bill of lading, Northam had a mere lien upon it, still it could not be attached as the property of Levin, without discharging it from the lien."

In *Curtis v. Norris* (8 *Pick.*, 280), an engagement to pay was held enough to prevent the attachment from affecting more than the surplus of goods in the garnishee's hands.

In *The Bank of South Carolina v. Levy* (*McMullen's R.*, 430), it was decided that a garnishee, to warrant the retention of goods on hand, need not prove that he was entitled to bring an action. It would be sufficient if his outstanding liabilities exceeded the amount of funds. This gave him a special property, superior in its nature.

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In *Nolan a. Crock* (5 *Humph. R.*, 312), an attachment was served when the garnishee was in advance for an actual cash balance, and was then under liabilities which he paid before the hearing of the cause. He was allowed for both, before the attaching creditor could come in.

I apprehend that the law is, that a factor or consignee, such as Perry was in this case, could sustain his lien for his own unpaid acceptances against an attaching creditor. (*Black a. Lachani et al.*, 3 *How. U. S. R.*, 483.) Yet there is some authority to the contrary. (See *Nelson a. Martin*, cited in *Locke on Attachment*, 57 note; *Taylor a. Gardner*, cited by Mr. Sergeant (*On Attachments*, 103), as decided by Judge Washington, C. C. U. S., January, 1811; *S. C.*, 2 *Wash., C. C. R.*, 686.)

But the lien in this point of view may be regarded as eventual and conditional; leaving the consignee a right to hold and resort to then existing funds for reimbursement, when he pays his own liabilities. The argument that the actual property in the notes was in *Lewis*, thus receives some confirmation.

The property to all the goods comprised in the bills of lading passed for many purposes to Perry; by his possession of such bills, coupled with his being in advance, and passed to him, before the goods themselves had arrived. (See further *Anderson a. Clark*, 2 *Bing. R.*, 20; *Hallie a. Smith*, 1 *Bos. & Pul. R.*, 513; *Bryan a. Mix*, 4 *Mason & W. R.*, 792; *Brownell a. Carnley*, 3 *Duer R.*, 9.)

This property or right in property extended to all the goods indiscriminately. Although in point of effect, there was a property in more goods represented by the bills of lading than the amount of his demand, yet neither *Lewis* nor any one under him, could claim a right to separate any particular parcel, and withdraw it from Perry's hands, without payment of the balance due him.

The correlative right and interest seems necessarily to have existed in *Lewis*. His remaining interest extended on the 6th day of April as much to the goods unsold, and to the notes unpaid for goods sold, as to the goods represented by the bills of lading, and in the course of transportation. If so, there was actual property in New York, in Perry's hands, which the attachment could fasten upon.

To repeat—Perry had on the 6th day of April a heavy debt

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owing him; he had some goods on hand, and notes taken on previous sales to an amount exceeding eight thousand dollars; he had bills of lading made in his name by the owner, comprising property which, with the goods and notes above-mentioned, exceeded in value his demand by over six thousand dollars.

Why was not Lewis's interest in the excess of this property applicable to the aggregate property? why not as much applicable to the unpaid notes then on hand, as to the goods in transition, and subsequently received?

In considering the cases above cited, and the principles they appear to involve, it seems to me more accurate to say, that the right of a consignee in advance for his consignor to property on hand, or to a bill of lading made in his name, is a qualified property, commensurate with and to support his lien, and no more; that strictly, and in legal precision of language the consignor is the owner. The qualified property enables the consignee to sue others for interfering with the goods; enables him to compel a delivery, or to support a claim for damages; and to defeat a claim of the shipper to stop *in transitu*. Still it is a special property—an ownership as lien holder, and nothing more. It is not absolute. It leaves the direct title, and something of interest in the consignor. A lien in its general sense, is the right to retain the property of another to answer a demand. (*Bouv. Law Dict.*, tit. *Lien*; *Rock v. Jenness*, 7 *How. U. S. R.*, 612.) The reasoning of the court in *Brownell v. Carnley* (3 *Duer*, 9), appears to me to sustain this view.

Section 32 of the statute of Massachusetts (ch. 90, part iii., 550, ed. of 1836) provides, that if the estate that is attached (real property) is subject to a mortgage or other incumbrance, and the mortgage is redeemed, or the incumbrance removed before the levy of the execution, the attachment shall hold the premises discharged of the mortgage or incumbrance, and the execution may be levied with the same effect, as if the mortgage or other incumbrance had never existed.

I may also advert to the cases of *Scott v. Whittemore* (7 *Foster's R.*, 309), and *Hill v. Wiggin* (11 *Ib.*, 300). In these it has been held that where property in the hands of a mortgagee was attached, no one but the mortgagee himself could make an objection as to the right of property being in the mortgagor. The

former case was a mortgage of personal property. "The mortgagee may or may not insist on his rights as mortgagee, and thus avoid the attachment. Until he does so elect, the attachment remains valid, though defeasible."

Again, it appears to be a well-settled general rule, that property which is subject to execution, is liable to attachment. (*Handy v. Dobbin*, 12 *Johns.*, 220.)

"Property" may be taken under the attachment. Its definition by the Code has been before stated. An execution may be against the *property* of the judgment-debtor (§ 286), and the *fi. fa.* is to direct satisfaction *first*, out of his personal property; and if enough cannot be found, *then* out of the real property. It seems a very just inference that, by the Code, what may be seized upon execution, may be attached.

Now by section 20 of the act "of executions against property" (2 *Rev. Stat.*, 366), when goods or chattels shall be pledged for the payment of money, or for the performance of any contract or agreement, the right and interest in such goods of the person making such pledge, may be sold on execution against him; and the purchaser shall acquire all the right and interest of the defendant, and shall be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.

It is insisted on behalf of the defendants, White, Warner & White, that the provisions of the statute respecting executions (2 *Rev. Stat.*, 305, §§ 13, 14, 15), apply to the present case.

By these enactments, executions bind from the time of the delivery. "If there are several executions issued out of a court of record against the same defendant, that which shall have been first delivered to an officer to be executed shall have preference, notwithstanding a levy first made under another execution; but if a levy and sale has been made under the subsequent execution before an actual levy under the execution first delivered, the goods shall not be levied upon or sold under such first execution." Then section 15 provides, "that if there be one or more executions, and one or more attachments against the property of the same defendant, or if *there be several attachments*, the same rule prescribed in the last section shall prevail, in determining the preference of such execution or attachment."

By section 16, "an execution or attachment issued out of a

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court not of record, if actually levied, shall have preference over any other execution issued out of any court, whether of record or not, which shall not have been previously levied."

The sale under the subsequent execution is rendered valid; the purchaser's title shall not be defeated by a future levy and sale under the senior execution. But it is said, that in making a disposition of the proceeds, on such sale, the sheriff must be governed by the priority in the delivery of the executions to him, unless such prior executions have for some reason become dormant as to the subsequent ones. (*Peck a. Tiffany*, 2 *Comst.*, 45.)

The Revisers in their note to these provisions (vol. iii., 727) state, that they are conformable to 4 *Cow.*, 411. There a *fi. fa.* first delivered to the sheriff, took preference of an attachment levied before the *fi. fa.* was levied; *Lambert a. Spaulding* (18 *Johns.*, 311) was relied upon as decisive. The attachment was from a justice.

Roy a. Hauount (19 *Wend.*, 495) was decided under section 16 of the act. A levy was made by the plaintiff, a constable, on the 5th day of August, 1834, by virtue of three attachments issued by a justice of the peace against the property of *Clow*. The sheriff of the county of Ulster had received an execution, and had taken some steps towards a levy on the 4th day of August, which was held insufficient as to the property in question. The attachments prevailed.

The provisions referred to can scarcely apply to attachments under the absent and absconding debtors act, found in the Revised Statutes of 1830. Those proceedings inured to the equal benefit of all the creditors who might come in. Attachments issued under that act could not be discontinued, without time being given to other creditors to appear. (In the matter of *Bunch*, 9 *Wend.*, 424.)

But there was a series of statutes, under which attachments similar to those of the Code issued, particularly on proceedings in justices' courts. (See 1 *Rev. Laws*, 1813, 393; *Laws of 1824*, ch. 238, §§ 23, 24.) Under these provisions it has been held, that the constable under an attachment, could take any goods and chattels which could be levied upon by execution. (*Handy a. Dobbin*, 12 *Johns.*, 220.) That the lien created by an attachment under the act (*Sess. Laws*, 204, § 21; 1 *Rev. Laws*, 1813,

398, § 23), when duly served was paramount to a subsequent execution or attachment. The lien would expire if the creditor did not prosecute his suit to judgment and execution with due diligence. (*Van Lorn v. Kline*, 10 *Johns.*, 135; *Sterling v. Welcome*, 20 *Wend.*, 238.)

To attachments of this character, the provisions in the enactment as to executions, may well apply.

But a difficulty exists in understanding how these enactments of 1830 can apply to the attachments under the Code of 1848, without a special provision, making them applicable.

Section 232 referred to does not meet the case. The sheriff is to proceed in the manner required by law in cases of attachments against absent debtors. It prescribes his course of action merely.

Section 471 of the Code provides, that the second part of that act shall not affect "any existing statutory provisions relating to actions, not inconsistent with this act, and in substance applicable to the actions hereby provided."

The enactment then of the Revised Statutes before mentioned remains in force, but the question still is, has that enactment been applicable to attachments under the Code?

But if these provisions can in any way be treated as prevailing under the Code, yet it seems to me that if there is no property in the hands of the party which is the subject of an attachment at the time of notice served, property so subject coming afterwards to hand, is not affected. If another attachment is then levied, it must prevail. An attachment takes its effect, not from delivery to the sheriff, but from its service. Supposing then that where there is property subjected to an attachment when it is placed in the sheriff's hands, but not served, a service of a subsequent attachment inures to the benefit of the first, and gives it priority. I do not see how that rule can prevail, when there was no such property on hand, at the delivery of the first.

These are my difficulties on this point, and the ground therefore upon which I place my judgment in the case is that before stated, of an actual sufficient attachment of leviable property subject to the lien of Perry, which he alone had a right to say displaced the effect of the attachment; and as he has been paid the amount of his lien, has left that property substantially bound.

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MONCRIEF, J.—The material question arising upon the evidence in the court below was, whether “the attachment of Milne & Reed, though subsequent in time, took priority in effect?” and it was held it did, and judgment was ordered for the payment of the funds to them. This, in my opinion, was erroneous.

The court below found that the debtor, Albert Lewis, had such an interest or property as was the subject of attachment. This view cannot be questioned; it is expressly so decided in 3 *Duer*, 9.

The property was in Samuel Perry by virtue of his previous advances, and the possession of the bills of lading gave to him, as against the world, the right to receive the goods and to dispose of them. (3 *Duer*, 12; 5 *Seld.*, 559.)

A notice of the issuing of the attachment was served upon Mr. Perry in each action. The same deputy-sheriff had possession of both writs.

In the case of White and others, the notice and copy attachment were received by Mr. Perry on the 6th day of April, 1854, and while the goods were on their way to New York. In the matter of Milne & Reed, the notice was served on the 15th day of June, 1854, and after the arrival of the goods at New York. Strictly speaking, neither attachment was levied upon the property in the hands of Mr. Perry, nor was there on behalf of either party such a service of the attachment as the law requires to create a lien. No inventory was made, and no notice given specifying the particular property or interest seized. (5 *Duer*, 250; 9 *Conn. R.*, 530; 7 *Id.*, 271; 4 *E. D. Smith's R.*, 443.) In neither instance did the deputy-sheriff receive a certificate from Mr. Perry.

The attachment of White and others was a valid and continuing process in the hands of the sheriff, at the time of the receipt of and service of notice under the attachment of Milne & Reed.

An attachment is “an anticipated execution,” to take and hold the property subject to a judgment in the action. (Thayer a. Willett, 16 *Johns.*, 107.) Execution in the hands of the sheriff binds the goods, and any levy made by him inures to the benefit of the executions in the order in which they were received. (1 *Cow.*, 592; 7 *Taunt. R.*, 57; 1 *Arch. Pr.*, 259; 2 *Comst.*, 451.)

The statute makes it the duty of the sheriff, upon the receipt

of any execution, to indorse thereon the year, month, day, and hour of the day, he received the same. (3 *Rev. Stat.*, 5th ed., 643, § 10.) Section 14 provides that, "if there be several executions issued out of a court of record against the same defendant, that which shall have been delivered first to an officer to be executed shall have preference, notwithstanding a levy may be first made under another execution;" and by section 15 it is further provided that, "if there be one or more executions, and one or *more attachments* against the property of the same defendant, or if there be *several attachments*, the same rule prescribed in the last section shall prevail in determining the preference of such executions or attachments. (See also 2 *Cow.*, 451.)

Previous to the Code there were, as now, the attachment for the benefit of creditors generally (under the absent, concealed, and non-resident debtor act), and for the specific benefit of the pursuing creditor, by virtue of the non-imprisonment act, &c.

The case of *Grant v. Shaw* (16 *Mass. R.*, 341), cited in the court below, was a case in which the defendant, at the time he was first summoned as trustee, had no property or interest in any property belonging to the debtor. He had expressly declined to accept the shipment, although the bills of lading had been sent to him, having refused acceptance and payment of the draft drawn thereon, the bills had been returned to the debtor. The plaintiff, after the return of the bills of lading, and the receipt of the goods by the defendant, again summoned him, but not until other creditors had served him with their processes.

It is quite evident, from the statement of the case, that the facts are dissimilar to the case under consideration.

The court, PARKER, J., said: "The defendant was not trustee until he had accepted the consignment and received the goods; until then it rested in contingency, whether he would be a debtor of the consignor or not. Had the defendant accepted the bill when presented, there could have been no question."

The statutes of Massachusetts provide that the garnishee cannot be attached, *inter alia*, 4th, by reason of any money or other thing due from him to the defendant, unless at the time of the service of the writ on him due absolutely, and without depending on any contingency. (*Rev. Stat. Mass.*, 1836, 643, 651.)

An examination of the statutes did not enable me to find a

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provision similar to that in our State, relative to the priority of executions and attachments, and I believe none exists.

I am clearly of opinion that as between the two attaching creditors—and the contest is confined to them—the attachment first delivered to the sheriff had priority, and that the court below erred in giving preference and awarding judgment in favor of the latter.

A new trial should be ordered, costs to abide the event.

PIERREPONT, J., concurred.

WILLIAMSON *a.* HENDRICKS.

New York Common Pleas; Special Term, January, 1860.

MECHANICS' LIEN.—COSTS.

If the owner, against whose property a mechanics' lien is filed for a claim justly due, does not protect himself by depositing the amount with the county-clerk, he will be liable for costs of proceedings to foreclose the lien.

It seems, that it would be otherwise if the amount claimed in the notice of lien were reduced on the trial.

HILTON, J.—In *Eagleson a. Clark* (2 *E. D. Smith*, 644), this court, at general term, held that the owner was chargeable with the costs of a judgment by default in favor of the lien creditor, rendered necessary by the owner failing to pay the lien without suit.

It seems that the owner has the option, in all cases where a lien is filed against his property, to relieve himself of any liability for costs of an action brought to enforce the lien, by depositing with the county-clerk a sum of money equal to the amount claimed (see *Lien Law*, § 11, sub. 2); and, consequently, when he fails to avail himself of this provision of the law for his benefit, and the claimant is needlessly put to the necessity of an action, there is a propriety in charging the expense of it upon the owner.

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It would probably be otherwise where the amount claimed in the notice creating the lien is greater than the sum actually owing upon the contract at the time the notice was filed, because in such a case an action might be necessary for the purpose of ascertaining the amount due from the owner, and limiting the recovery of the lienor to the sum thus ascertained.

Here, no such necessity existed. It is conceded that, at the time the notice was filed, there was in the hands of the owner, and due to the contractor upon the contract, a sum more than sufficient to discharge the lien, and the neglect of the owner to pay the amount without action makes him chargeable with the costs, within the decision and rule stated.

Ordered accordingly.

FRENCH *a.* WILLET.

New York Superior Court; Special Term, January, 1860.

SHERIFF.—ASSIGNING OVER PRISONERS.—COMPLAINT.

A sheriff who, on going out of office, neglects to deliver over to his successor a defendant whom he holds in custody under execution against the person, is liable for such neglect to the plaintiff in the execution.

Form of a complaint in an action in such case.

In an action against a sheriff for breach of duty in the execution of process which he received, it is not necessary that the complaint should show the several steps in the action on which the mere regularity of the process depends. It is enough, after showing jurisdiction to issue the process, to allege that it was duly issued.

Demurrer to complaint.

The action was against the defendant as late sheriff of the city and county of New York. The allegations of the complaint were as follows:

That on the 9th day of February, in the year 1856, the plaintiff recovered, in the Superior Court of the city of New York, a judgment in an action against one Plin White, for the sum of

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twelve thousand five hundred and eighty-eight dollars and fifty-six cents, a transcript of which said judgment was on the same day filed in the office of the clerk of the city and county of New York.

That the said action was brought to recover the amount of a debt fraudulently contracted by the said Plin White.

That thereafter, on the said 9th day of February, in the year 1856, an execution against the property of the said Plin White, upon the said judgment, was duly issued by the plaintiff to the defendant, who was at that time sheriff of the city and county of New York, which said execution was thereafter, by the said defendant as such sheriff, returned wholly unsatisfied.

That thereafter, to wit, on the 14th day of April, in the year 1856, an execution against the person of the said Plin White was duly issued by this plaintiff, on the said judgment, to the defendant, who was then sheriff as aforesaid, directed and delivered to the defendant as such sheriff, whereby he was required to arrest the said Plin White, and commit him to the jail of the said county of New York until he should pay said judgment, or be discharged according to law.

That thereafter, to wit, before the first day of January, in the year 1859, the defendant, as such sheriff, arrested the said Plin White upon the said execution, and committed him to jail pursuant thereto.

That on the first day of January, in the year 1859, the term of office of the defendant as sheriff, as aforesaid, expired; and that a new sheriff, to wit, one John Kelly, was elected as sheriff in place of the defendant, and duly qualified and gave the security required by law.

That the certificate of the clerk of the city and county of New York, under his official seal, certifying that the said John Kelly had qualified as such new sheriff, and given the security required by law, was duly served on the defendant on or about the 11th day of January, in the year 1859.

That the defendant did not, within ten days after the service on him of such certificate, deliver to his successor, the said new sheriff, the said Plin White, who then remained in custody of the said defendant, on the said execution, confined within the liberties of the jail of the city and county of New York.

Wherefore, &c.

The defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

A. J. Vanderpoel, in support of the demurrer.—I. The question as to what is an escape, is now settled by statute. Doubts had been expressed as to what was an escape, and the statute was passed to remove them. (2 *Rev. Stat.*, 434, § 47; *Ib.*, 437, §§ 61–63; 3 *Ib.*, 746, note to § 47; and see *Johnson a. Macon*, 1 *Wash. R.*, 4; *Boynton's Case*, 3 *Rep.*; *Cary a. Worthy*, 2 *Jones (N. C.)*, 104.)

II. The prisoner here did not escape. No escape is alleged, and the facts relied on as constituting an escape, do not constitute one.

III. The failure to deliver over a person to the new sheriff does not relieve him from custody. (2 *Rev. Stat.*, 439, § 73; *Hempstead a. Weed*, 20 *Johns.*, 64; *Partridge a. Westervelt*, 13 *Wend.*, 500.)

IV. The rights of the new sheriff as to prisoners not assigned, is a different matter from that raised here.

V. In *Hinds a. Doubleday* (21 *Wend.*, 233), the question here involved could not arise, and is only incidentally referred to. There there was an actual escape.

VI. The complaint is fatally defective in other respects. It does not show any right in the plaintiff to require that *Plin White* should be arrested or kept in custody. This is essential. The plaintiff must allege and prove that the process was valid. The complaint must show a legal commitment. Whenever the process is void, it is a defence to the sheriff for an escape, not when it is merely irregular. (*Jones a. Pope*, 1 *Saund.*, 38 (6); *Troiner a. Eyles*, 3 *Bos. & P.*, 456.) So are all the precedents. (*Ginochio a. Orser*, 1 *Abbotts' Pr. R.*, 433; *Brazier a. Jones*, 8 *B. & C.*, 124; *Edwards a. Lucas*, 5 *Ib.*, 339; *Corwin a. Freeland*, 2 *Seld.*, 560; *S. C.*, 6 *How. Pr. R.*, 241; *Alden a. Sarson*, 4 *Abbotts' Pr. R.*, 102; *How. Code*, 185; *Wells a. Jewett*, 11 *How. Pr. R.*, 242; *Graham a. Machado*, 6 *Duer*, 514; *Van Sandvoord's Pl.*, 249, &c.; *Lienan a. Lincoln*, 3 *Duer*, 670; *Lawrence a. Wright*, 2 *Ib.*, 673.

John E. Parsons, opposed.

French & Willet.

WOODRUFF, J.—The averments that the plaintiff recovered a judgment in an action against the defendant therein, which action was brought to recover the amount fraudulently contracted, show a case in which, by the express terms of sections 179 and 288 of the Code of Procedure, the plaintiff had the right to have an execution against the person of the defendant in the judgment. The court had jurisdiction of such an action, and power to issue such an execution.

The further averment that an execution was duly issued, is, as against the sheriff, all that is necessary. If it was necessary to the regularity of the execution, that a previous order of arrest should have been obtained (which is not to be taken as concluded), the execution which was issued would not be void, though issued without such an order.

The sheriff, who has received such an execution and arrested the defendant, cannot require the plaintiff to allege affirmatively every step in the progress of the cause upon which the regularity of the proceedings depends. He can no more require the plaintiff to enter into the details of the defendant's fraud, than he can refuse to execute an order of arrest, and require the plaintiff to allege that the justice approved the sureties given, on granting the order of arrest, or any facts not essential to jurisdiction, but tending to regularity merely.

So when the plaintiff avers that the execution was duly issued, he states enough to put the sheriff to his defence, if he do not obey the writ.

In regard to the gravamen of this action, the averment that the defendant (the sheriff) did not deliver the debtor held under the execution to his successor in office, shows a clear and explicit violation of the statute, and breach of the duty which the defendant owed to the plaintiff. For this, the defendant is *prima facie* liable.

This is enough to put him to his defence. He is, in every aspect of the case (this averment being admitted, and no excuse or avoidance of liability being set up), liable to nominal damages at least.

If in truth the defendant, by delivery of the jail, and the execution of an instrument reciting the property, process, and prisoners delivered, complied with the statute, that will be a subject of proof on denial of the plaintiff's averment.

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If the prisoner remained in custody under such circumstances that the new sheriff had a right to hold him and did hold him, or if the new sheriff did, notwithstanding the neglect of the defendant to deliver him, take the prisoner into his possession under section (73) 94 of the statute, in such wise that he had a right to detain him, and does detain him in custody, this may be available in mitigation of damages, or perhaps to show that no damages have been sustained; but as the case stands in the complaint, a cause of action is shown to which the defendant is bound to answer, or he is, I think, liable.

This I think the necessary result of the provisions of the statute (2 *Rev. Stat.*, 438, 9, §§ (67-73) 88-94); and the inevitable inference from the opinion of the court in *Hinds v. Doubleday* (21 *Wend.*, 225).

The demurrer must be overruled, with costs, with leave to the defendant to withdraw his demurrer, and answer within twenty days, on payment of the costs of the demurrer and proceedings thereon.

Ordered accordingly.

*Modified
to all 319.*

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New York Common Pleas; Special Term, November, 1859,

SUPPLEMENTARY PROCEEDINGS.—STIPULATION EXPLAINED.

Where a judge is asked to make an order in supplementary proceedings requiring the application of property alleged to belong to the defendant, but in the possession of and claimed by another, the testimony should show beyond reasonable doubt that the claim is unfounded, and used merely as a cover.

Even if this is shown, yet if the property is such as may be levied on, the plaintiff may properly be left to his execution.

Where the evidence merely excites a suspicion that property which might be levied on was transferred in fraud of the creditor, and without consideration, its application should not be compelled by an order.

A stipulation on the part of the debtor, stating the cause of action to be money received, and allowing judgment to be entered, held not conclusive on a motion for execution against the person on the ground that the cause of action was one for which an arrest was allowed.

Hall v. McMahon.

Motions for several orders in supplementary proceedings, and for execution against the person.

The plaintiff, having obtained judgment against the defendant, commenced supplementary proceedings against him under section 292 of the Code; and obtained an order forbidding him from interfering with his property. Upon the return of the order a reference was directed to examine the defendant and witnesses. The nature of the testimony sufficiently appears in the opinion.

Upon the report of the referee, the plaintiff now moved for an attachment against the defendant for a contempt in disobeying the order restraining him from interfering with his property, and for an order that certain moneys, shown by the testimony to be in the hands of a third party, be paid over to the plaintiff, and for an order that a receiver be appointed.

The action was originally brought in the Marine Court to recover for work, labor, and services rendered by the plaintiff to defendant. It appears that the work was done on a vessel, and that the defendant had undertaken, by a written agreement with plaintiff, to proceed to collect from the vessel the claim in suit, together with a claim held by the defendant. On the trial in the Marine Court, the defendant gave a stipulation allowing judgment to be entered against him for a certain proportion of the claim, "said percentage having been recovered and received by the defendant herein in an action against" the vessel in question. Judgment was accordingly entered, and it was upon this judgment that the present proceedings were taken.

At the same time with the motion for an attachment, receiver, &c., the plaintiff moved for leave to issue an execution against the person. His affidavit for this purpose, alleged that the action was for money received and converted by the defendant, and set forth the stipulation. The defendant's affidavit, in opposition, denied that this was the cause of action, and set forth the history of the case, alleging that he had never yet received any thing from the claims against the vessel, and explaining the stipulation as having been signed by him, if at all, under a mistake as to its terms.

James S. Stearns, for the motions.

J. M. Sheehan, opposed.

HILTON, J.—In supplementary proceedings, where a judge is asked to make an order requiring property alleged to belong to the defendant, but in the possession of and claimed by another, to be delivered over to a receiver, the testimony should show beyond a reasonable doubt that the claim is without any foundation in fact, and used merely as a cover to protect the defendant's property from the just demands of his creditors. And even in such a case, where the property is capable of being levied on, there would be no impropriety in refusing the order—leaving the plaintiff to his remedy by a levy upon the property, under an execution issued upon his judgment.

Here, the most, I think, that can be said of the evidence taken before the referee is, that it excites a suspicion that the bill of sale by the defendant to his nephew was without adequate consideration, and made upon some secret understanding by which he was to have an interest in the business thereafter carried on by the nephew.

This is not enough to justify me in making the order applied for. If, as the plaintiff contends, the property described in the bill of sale, and the horse, are clearly the property of the defendant, there will be no risk incurred by taking them upon execution, which he can issue at any moment, or they may be reached through an action brought by the receiver.

In respect to the application for an execution against the person of the defendant, it is sufficient to say, that the evidence upon the trial of this cause showed that the action was brought to recover for work, labor, and materials furnished to the defendant, and although the stipulation signed at the time by the defendant gives some ground for supposing that the recovery was for moneys had and received by the defendant as belonging to the plaintiff, yet that supposition is entirely overcome by the affidavit of the defendant, and the agreement signed by the parties in March, 1854.

Therefore, the only order granted will be that for the appointment of a receiver; all the others are refused.

O'BRIEN *a.* BOWES.

New York Superior Court; General Term, January, 1860.

MODE OF TRIAL.—ORDERING TRIAL BY JURY.

If an action properly triable before a single judge without a jury, is regularly brought to trial in that way, and a trial had, the court cannot, after all the evidence is closed and the cause submitted, order a trial of questions of fact by a jury. The judge must determine the case.

An order for the trial of questions of fact by a jury, must be made before the cause has been actually tried.

It seems, that a motion for trial by jury cannot be made after ten days after issue joined; but that the court may, of its own motion, at any time before an actual trial has been had, order a trial by jury.

Appeal from so much of an order, made after the trial and submission of the cause, as allowed a trial of the questions of fact by a jury; and an appeal from an order directing the issues of fact to be so tried, and settling the issues therefor.

It appeared by the pleadings and the orders appealed from, that this was an action brought by the plaintiff, alleging a partnership between herself and the defendant, and praying for a dissolution, an account, a receiver, and sale, and a distribution of the property—and payment to herself of whatever was found due to her.

The answer denied every material fact alleged, and the issues thus raised were brought to trial.

Proofs were given by the parties respectively, and they rested, submitting the case to the court for its determination.

The trial was had before a single judge without a jury, and upon such submission on the 20th day of June, 1859, he ordered, "That the complaint in this action be dismissed without costs, unless the plaintiff apply within five days after the service on her attorney of a copy of this order, for a trial of the questions of fact in this action under the Code, in which case the question of costs is reserved." From so much of this order as annexed

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a condition to the dismissal, allowing the plaintiff to apply for a trial of the questions of fact, the defendant appealed.

On the fifth day thereafter the plaintiff applied for and obtained an order, "That the issues of fact in the action raised by the following questions be tried by a jury, and that said trial be had by submitting to and obtaining the answer of the jury to the following questions"—specifying some of the questions of fact involved in the issues, and material to the final disposition of the cause, but some only.

From this order, also, the defendant appealed.

Frank Byrne, for the appellant.

J. E. Parsons, for the respondent.

BY THE COURT.—WOODRUFF, J.—It is clear that this is not an action for the recovery of money only, or for any of the relief specified in that section of the Code of Procedure which declares what actions must be tried by a jury. (§ 253.) It seeks other relief, and falls within the provisions of that section (§ 254) which declares that "every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury."

It is a suit which under our former system would have been a suit in Chancery—and in which a feigned issue might have been ordered, if doubtful questions of fact arose upon conflicting evidence; and it is, therefore, a case plainly within the provisions of section 72 of the Code, which provides that "feigned issues are abolished; and instead thereof, in cases where the power now exists to order a feigned issue, * * * an order for the trial may be made, stating distinctly and plainly the question of fact to be tried, and such order shall be the only authority necessary for a trial."

There was, therefore, no lack of power in the court to order any question of fact arising upon the issues between the parties to be tried by a jury, and to settle and determine what questions should be so tried.

The ground of the present appeal is, that it was too late to make the order when it was made. That, in fact, the cause had been tried by the court without a jury, and nothing remained but to render judgment; and that the parties respectively were

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entitled, as matter of legal right, to the decision of the judge upon the questions submitted to him. Not only so, but that in fact that decision was in substance made by declaring that the complaint be dismissed, unless the plaintiff applied for a trial.

The power of the court to order a trial by jury being clear, the inquiry is, when that order may be made, and at what stage of the proceedings it may not be made.

Rule 33 of the present rules of the court provides in terms that in cases of this description, "if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings that the whole issue, or any specific question of fact involved therein, be tried by a jury."

So that, by going to trial before a judge sitting without a jury, the parties plainly lost all right to move for such a trial on that hearing, or to make such motion at any time afterwards. The order of the 20th day of June, permitting the plaintiff to move for a trial by jury was in direct opposition to the rule, and the motion made in pursuance of that permission was in like manner in conflict with its provisions.

If, however, the court had power in this stage of the cause, as of its own motion, to direct the trial of the questions of fact by the jury, the order should not be reversed merely because the court authorized the plaintiff to ask for such an order.

That the court may for its own relief, at any time before the actual trial of the issues, invoke the aid of a jury for their determination, or for the determination of any question of fact involved therein, I entertain no doubt.

The power of the Court of Chancery to do so before the Code was unquestionable, and the terms of section 254 of the Code, above referred to, are broad and unqualified in conferring the power.

And although the rules of court have made it the duty of the party, if he desires such a trial, to apply within ten days after issue joined, his neglect to do so no more deprives the court of the power to seek the aid of a jury for its own relief, than the omission of the parties to apply for a reference renders it necessary for the court, or the court and jury, to examine a long account, at whatever loss of time or however great the inconvenience.

In this respect I fully agree with Mr. Justice Harris in his opinion, expressed in *Church a. Freeman* (16 *How. Pr. R.*, 297).

The court, when a cause is brought on for trial, if it appear that the trial will require the examination of a long account, may order a reference. Not only so, if there are questions to be settled which ought to be decided as a basis of the reference, or as a guide to the conduct of the referee, the court may undoubtedly hear and determine those questions, and then send the matter to a referee for the taking of the account.

So the court, when the cause is called for trial, if it see that questions of fact are involved, the determination of which may depend and probably will depend upon conflicting testimony, may order those questions to be tried by a jury. It was a common exercise of the power of a Court of Chancery; the Revised Statutes did not deprive the court of the power, and the Code, so far from taking it away, or restricting its exercise, appears to me to confirm it. (*New Orleans Gas Light Company a. Dudley*, 8 *Paige*, 452; *Gardner a. Gardner*, 22 *Wend.*, 536; *Monson a. Clarke*, 1 *Clarke Ch.*, 580.) It was the usual practice in Chancery to make the application for such a trial when the cause was brought to a hearing. (18 *Ves.*, 481; 1 *Hoffm. Ch. Pr.*, 503; 1 *Sim & S.*, 366.) And though the rule of court may now prevent a party from making a motion therefor at that stage of the proceedings, I know of nothing to prevent the exercise of the power by the court if the aid of a jury is desired.

But these views are not decisive of the present appeal. In this action there was no application by the parties for a trial by jury. The court at the trial did not order the submission of any questions to a jury. The cause was regularly brought to trial, and was tried before the judge. All the testimony which either party desired to give respecting the matters in issue was given, and the cause was submitted for determination.

All this having been done, we think all questions respecting the mode of trial were at an end, and it was the duty of the judge to decide the questions submitted. Not only so, we think it was a right of the parties respectively to have his decision.

We are aware that the Court of Chancery was accustomed, when not satisfied by the proofs as they were exhibited, to order

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a cause to stand over for the production of further proofs. That court was always open, and such an order was in substance continuing or protracting the time of the cause until the matter was ripe for determination, but even that course did not involve a refusal to decide when all the proofs were in, and the case submitted for decision.

Our present system assimilates the practice in all actions, whether in law or equity. Our courts are held at successive terms, under regulations conformable to the practice of courts of law. A trial cannot regularly be begun in one term and be finished at another. And although it may be allowable to suffer a case to stand over from day to day for further proof, when the judge is sitting without a jury, we think that when the parties have closed their evidence and submitted the cause, the judge has no alternative. He must decide. He may, experience teaches that he often does, regret that the responsibility is upon him, and that he cannot rely on a jury to decide under conflict of evidence and doubts as to the credibility of witnesses, but we think he cannot decide, and that whatever might have been the power of a chancellor, the Code has allowed him no choice.

Section 267 of the Code declares, that upon a trial of a question of fact by the court, its decision shall be given in writing, and filed with the clerk within twenty days after the court at which the trial took place.

In respect to the time of decision, this may be merely directory; but the duty to decide is absolute and unqualified, and we have no doubt that the right of the party to have a decision, and a decision of the very question tried, is so perfect and absolute that a mandamus would lie to compel the judge to make the decision.

Nor can the judge satisfy the law by any order to stand over, or to try the question elsewhere; he must decide the question of fact, and this appears from the words of the section which follow, viz.: "Judgment upon the decision shall be entered accordingly."

It follows from these views that the orders appealed from were erroneous, and so far as appealed from should be reversed.

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THE PEOPLE AND TAYLOR *a.* THE MAYOR, &c., OF
NEW YORK.

Supreme Court, First District; General Term, July, 1858.

PARTIES.—ACTION FOR LANDS.—RECEIVER.

In an action for lands, under the Code, there cannot properly be several plaintiffs claiming under distinct titles for distinct interests.

The People of the State and certain individuals who were their lessees of real property, united in bringing an action for the possession thereof. The complaint alleged that the lands were owned in fee by the People, who, unless a lease thereafter described was valid, were entitled to the possession; that the Corporation of the city of New York had taken possession of the premises, and rented the same to the other defendants, who, unless the lease thereafter described was valid, wrongfully withheld possession from the People; that subsequent to such taking possession, the People gave to the individual plaintiffs a lease of the lands, who, under the lease, if it was valid, became entitled to the possession, but the defendants wrongfully withheld it; that the defendants in possession refused to pay rents to the plaintiffs, being directed to refuse by the Corporation, and that they paid their rents to the agent of the Corporation.

Held, that the People were not entitled to judgment, either for possession or for rents and profits. By the averments of the complaint they appeared to have no interest in the action, and were not proper parties thereto.

A receiver cannot be appointed in an action to recover possession of real property, unless some equitable grounds are made to appear, entitling the plaintiff to the rents and profits *as such*, or unless their sequestration is necessary to his protection.

An injunction was granted, and a receiver of the rents and profits of the premises, the title to which was the subject of this action, appointed in July, 1858, at a special term. The facts of the case are fully stated in the report of that and other proceedings in the cause, 8 *Ante*, 7.

The Corporation appealed from the order for an injunction and a receiver.*

* After argument of the appeal at the November term, 1858, this decision was made, and would have been announced in February, 1859, but for the fact that

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William Curtis Noyes and *Charles O'Connor*, for the appellants, the Mayor, &c.

E. W. Stoughton and *John Van Buren*, for the respondents, the People, and Taylor, and Brennan.

BY THE COURT.*—MULLEN, J.—The People of the State granted to the city of New York the right to erect piers on a strip of land lying westerly of the city limits, and to receive the income thereof. In process of time these piers became filled up so as to render them unfit for the uses for which they were constructed, and the city proceeded and filled up said piers, to the same level with the adjoining upland, and on it erected a temporary building for a market, adjoining Washington Market, and rented said building and the lands adjoining to marketmen for weekly rents. The filling up was done in 1853, and the city has leased said premises for about \$40,000 per annum since that time.

In April, 1858, the commissioners of the land office leased the premises in controversy to Messrs. Taylor and Brennan for one year from the 1st May then next, at the annual rent of \$5000, payable quarterly in advance. By a subsequent resolution, the term created by said lease was extended until such time as the said premises should be disposed of according to law, or until the said commissioners should otherwise direct.

Soon after the execution and delivery of this lease, the said plaintiffs commenced this action, and procured the appointment of a receiver of the rents and profits of the said property, and an injunction restraining the city and its agents from collecting the same. From this order this appeal is brought.

The complaint as amended contains a single count, and it charges that the People are owners in fee of the premises in question, and legally entitled to the rents, issues, and profits up to 1st May, and to the possession since, unless Taylor and Brennan are entitled; that the city has taken possession of and

the plaintiffs discontinued the suit as against the city, and sent a written notice of the fact to all the judges. But in June or July last the corporation counsel gave notice of motion for judgment, and on July 12 the court met and pronounced their decision as above.

* Present, DAVIES, CLERKE, and MULLEN, JJ.

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rented the same to the other defendants, and unless said lease be held valid, said defendants withhold from the People the possession; that the People by the commissioners of the land office made the lease above mentioned, on which the lessees paid in advance one quarter's rent; that the said city occupy and rent, and withhold possession from said Taylor and Brennan, who are legally entitled to possession thereof; that the tenants of the city pay rent to the city officers, and refuse to pay to plaintiffs, or to acknowledge their title. The complaint then charges that the rents are not properly collected by the city, and are not paid into the city treasury; that the agents who collect are irresponsible, and that the rents will be lost unless the city is restrained from collecting; that the occupants of said premises have for several years last past paid annually for the use thereof over \$40,000; that the comptroller of the city has stated that the city has no title to the premises, and therefore he has omitted attempting to enforce the collection of the rents; that many of the defendants are non-residents and irresponsible, and the rents would be lost unless collected weekly; and that said comptroller has stated that a receiver of said rents ought to be appointed. The plaintiffs then pray judgment against defendants, and each of them, in favor of whichever of plaintiffs is entitled thereto, and that the rights of the plaintiffs as between themselves and defendant, and each of them, may be declared, and that defendants may be adjudged to render possession to whichever of plaintiffs may be entitled thereto, and to pay the damage for rents, issues, and profits, while said premises have been unlawfully withheld.

An injunction is also prayed for, restraining the officers of the city from collecting rents, and the other defendants from paying the rents to such officers.

This complaint expressly alleges that the State, the owner in fee, did, on the 24th April last, lease the premises, for a year, to Taylor and Brennan. The People then were not, on the 13th May, when this action was commenced, entitled to the possession of these premises, and as a consequence could maintain no action to which possession or the right of possession is essential. So far then as the complaint asks for a judgment that possession be delivered to the People, it shows by its own averments that the People are not entitled to any such judgment.

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For the same reasons the People are not, during the running of the lease, entitled to the rents and profits. They belong only to the party entitled to the possession. At the commencement of the term created by the lease, the right of the People to the rents and profits ceased.

The People cannot unite with Taylor and Brennan in an action for the rents and profits accruing before the lease was given, as Taylor and Brennan have no interest in such rents and profits.

The Code (§ 111) requires that action shall be prosecuted by the real party in interest. This precludes, it seems to me, not only all nominal parties, but all having a mere speculative interest in the subject-matter of the controversy. In no aspect of the case can I perceive any interest in the State in this litigation. The case must be disposed of on the principle that Taylor and Brennan are the only parties plaintiff in this suit.

It was argued by the plaintiffs' counsel that such a joinder of parties as was made in this case was held proper in *Lee v. Balentine* (7 *Wend.*, 4705). In that case a motion was made on the part of the defendants to strike out two counts from the declaration, on the ground that another suit had been brought by the lessors of the plaintiff on those counts for the recovery of the same premises. The motion was denied, but not on any principle that would help the plaintiffs here. In the action of ejectment at common law, it was competent to allege a demise from as many lessors as there were counts. There was but one plaintiff, although he was a mere imaginary one. All this is swept away by the Code. Under it there cannot be several plaintiffs claiming under distinct titles for distinct interests.

Assuming that Taylor and Brennan are the only parties plaintiff, let us in the next place ascertain what they seek to obtain in this suit. In their behalf a surrender of possession is demanded, and a judgment for rents and profits. This is precisely the relief given in ejectment, or, as it is now called, the action to recover possession of real property. It is alleged in the complaint that the occupants have for several years last past paid annual rent for said premises, and that the city has rented portions of the said premises to the several defendants. The landlord and tenants then are joined as defendants in the action, and a surrender of possession and payment of rents and profits

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are demanded from both. I will not stop to inquire whether it is proper to join such parties as defendants, but will assume that it is. Let us see what results follow such a joinder, in a case where a receiver of the rents and profits is appointed. The receiver collects the rents secured by the landlord's lease. He thus treats the lease as valid, and of course the terms created by the lease are valid also. The gravamen of the action is that both landlord and tenant are trespassers—in without right; the receiver treats the tenant as lawfully in, and the term as validly created by the landlord. The application for the receivership of the rents from the tenants is a distinct recognition by the plaintiff of the validity of the tenant's term.

When the landlord alone is sued in ejectment, having left the property to tenants, and is himself irresponsible, I can perceive no objection in such case to the appointment of a receiver of the rents. In such case the absurdity of seeking to remove the occupant because his possession is unlawful, and at the same time accepting rent as for a lawful occupation, is avoided.

If, as against these actual occupants, a receiver may be appointed, and they compelled to pay over the rent to him, then surely a receiver may be appointed to receive of the actual occupant the value of the use of the premises pending the litigation, although he is, in claiming by title, averse to that of the plaintiff. If so, then this result would be obtained. An action is brought by A to recover a farm of land of which B is in the actual occupation. The plaintiff asks, and if the principle contended for is sound, is entitled to have a receiver, and an order that the defendant pay to him such sum as he, the receiver, shall deem the use of the property reasonably worth, or be punished as for a contempt.

It seems to me, therefore, that in an action of ejectment as such, and when no equity in favor of the plaintiff intervenes, no receiver of rents and profits can be appointed pending the litigation.

There are several matters charged in this complaint in regard to the manner of collecting the rents, the solvency of the occupants, and the views of the city officers as to the title of this estate and the propriety of a receiver.

I cannot discover the slightest connection between these allegations and the merits of this action. In ejectment, the plaintiff

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recovers the value of the use and occupation, not the rents derived from leases of the property. He has, therefore, nothing to do, under ordinary circumstances, with the rents, unless the defendant (who must be the person to whom the rents are due) is insolvent. There is not in this case any pretence of insolvency.

There is no authority for appointing a receiver because the defendant is a transient person or insolvent, except in the case mentioned above.

It seems to me that the appointment of a receiver of the rents and profits, and the receipt of them by him, amount to a perfect ouster of the defendant. It is taking from him the subject-matter of the litigation without trial or judgment; and although it does not transfer it to the plaintiff at once, yet in the event of a recovery by the plaintiff it operates as a transfer by relation from the time of the entry by the receiver.

The distinction between legal and equitable actions is preserved by the constitution. The abolition of the forms of action does not interfere with the actions themselves.

The Legislature could not, I apprehend, abolish the distinction between legal and equitable causes of action. The parties in those actions which were triable by a jury before the constitution of 1846, have still the right to have them thus tried. Without direct violation of the constitution, the jury in such cases cannot be dispensed with, except by the consent of the parties. An act of ejectment was one of the actions in which a jury trial was allowed to the parties as a matter of right. That right still exists, although the name has been changed. If, then, we are to treat the complaint in this case as the commencement of an equitable action, and therefore to be tried by the court, the defendants at the conclusion will find that the action is an ejectment in its operation, by whatever name it may be known.

It may be proper in an ejectment suit under the Code to incorporate in it such facts as show the propriety of the appointment of a receiver, or the issuing an injunction order. These facts thus stated do not change the nature of the action, or the rights of the parties as to the mode of trial.

Were this an equitable action, in both form and substance, I think I would not appoint a receiver on the matters set up

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in this complaint. It is true, an apparently good title is shown in the plaintiff to the premises in question. This is one essential element in a complaint to entitle the plaintiff to a receiver, but it is not all. It must also appear that the appointment is necessary to protect the property, or its rents and profits, *pendente lite*.

When the defendant really liable is responsible and within the jurisdiction, then no such necessity can, under ordinary circumstances be made to appear. In this case the plaintiff is not entitled, and will never be entitled, to the rents received by the city as such. He will be, if he recovers, entitled to the value of the use. This may be more or less than the rents received. When insolvency of the defendant or other equitable consideration exists for the appointment of a receiver of the rents and profits, the rents and profits are taken either because the plaintiff is entitled to the rents as such, or unless they are seized, the plaintiff will be without remedy for the value of the use and occupation. I think, therefore, it may be affirmed as a general rule that a receiver cannot be appointed in an action of ejectment, unless some equitable grounds are made to appear entitling the plaintiff to the rents and profits as such, or that their sequestration is essential to his protection. A valid title in the plaintiff is essential, but not of itself sufficient to authorize the appointment of a receiver.

I am, therefore, of the opinion, that the order appealed from should be reversed, with costs.

CLERKE, J., concurred.

MASTERTON *v.* HOWELL.*New York Common Pleas; Special Term, May, 1859.*

REFERENCE.—LONG ACCOUNT.

An action to recover compensation for indorsing, for defendant's accommodation, a large number of his notes, is properly referable, as requiring the examination of a long account, if the case involves no difficult questions of law.

Motion for a reference.

The action was to recover commissions for a number of accommodation indorsements made by plaintiff for defendant.

The plaintiff moved for a reference of the issues, upon an affidavit that his claim consisted of a large number of items of account, about two hundred items of which were denied by the answer, and that they would have to be separately proved on the trial.

The defendants resisted the motion, on an affidavit made by one of them, that he had the books of defendants in his possession, and they showed the number of notes indorsed, and ascertaining the facts would be the work of but a few moments; that they were advised by counsel the only questions of importance which could arise were—1. Whether defendants promised to pay for the indorsements; 2. What the same were worth; and, 3. Whether such indorsements were a good consideration for a promise. The deponent further alleged that the indorsements were not matters of account, and that plaintiffs had repeatedly told deponent that they had kept no account of them.

Luther R. Marsh, for the motion.

W. Z. Larned, opposed.

HILTON, J.—The plaintiff sues to recover compensation for indorsing negotiable paper for the defendant, to enable him to procure the same to be discounted; and it is alleged that this

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was done upon the defendant's promise to pay a reasonable compensation therefor.

The number of notes thus indorsed is not stated; but it is alleged that they exceeded twenty, and that the amount was over \$75,000.

To determine the compensation to which the plaintiff may be entitled under this agreement, it will be necessary to ascertain both the number and amount of the notes, and this will, it seems to me, require the examination of a long account on the part of the plaintiff; and as the investigation will not require the decision of difficult questions of law, the action falls within the class which the court may order to be referred. (*Code*, § 371, sub. 1; *McCullough a. Brodie*, 13 *How. Pr. R.*, 346; *Dewey a. Field*, *Id.*, 437; *Van Rensselaer a. Jewett*, 6 *Hill*, 373; *Samble a. Mechanics' Fire Insurance Company*, 1 *Hall S. C. R.*, 560.)

Motion for reference granted, costs to abide event.

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Court of Appeals; December, 1859.

LANDLORD AND TENANT.—ACTION FOR RENT.—EVICTION.— COUNTER-CLAIM.

A tenant who has continued to occupy the whole of the demised premises during the whole period for which rent is claimed, is not released from payment of such rent by reason of the fact that the landlord has committed acts which diminished the beneficial enjoyment of the premises during the period for which the rent is sought to be recovered. While the tenant remains in possession of the entire premises, his obligation to pay rent continues; though it is otherwise if he is compelled to abandon possession before the rent falls due.

Wrongful acts on the part of a landlord, not merely a breach of the contract of leasing, but wrongful independent of his obligations under that,—*e. g.*, injuries to the tenant's property on the premises, and to the possession, committed not under a claim of right,—cannot be set up as a counter-claim by the tenant in an action against him for the rent.

Appeal from the New York Common Pleas.

This was an action for rent, in which the the plaintiff had judgment on his demurrer to defendant's answer. The facts and the decision of the court below will be found reported, 5 *Ante*, 1.

John Graham, for the appellant.—I. A wrongful eviction of the tenant by the landlord from a part of the demised premises, suspends the rent (*i. e.* of the whole) until possession is restored. (Christopher *a.* Austin, 11 *N. Y.* (1 *Kern.*), 216.)

II. The landlord cannot recover, on the agreement to pay rent, a portion thereof, or any compensation for the part of the premises occupied by the tenant, while such eviction continues. In this case the answer shows that the eviction commenced with and lasted through the entire quarter for which rent was claimed. To render eviction from the premises a valid defence, it must have taken place before the rent became due. (Giles *a.* Comstock, 11 *N. Y.* (1 *Kern.*), 270, 275.)

III. The beneficial enjoyment of the premises is the consideration for the obligation to pay rent. A deprivation of this consideration is an eviction. (Christopher *a.* Austin, *supra*, approving the language of SPENCER, Senator, in Dyett *a.* Pendleton, from which DALY, J., below, dissented.)

IV. If the landlord creates or connives at the nuisance which divests the tenant of the beneficial enjoyment, or if he has any connection whatever with the nuisance, he loses his right to the rent. (Gilhooley *a.* Washington, 4 *N. Y.* (4 *Comst.*), 217.)

V. The answer shows that the defendant intended to, and would have availed himself of the privilege of renewal in the lease, and so the plaintiff well knew. The legal effect of this is to make the lease a demise for two years—as much so as though it had been executed for that period at first. (Chretien *a.* Doney, 1 *N. Y.* (1 *Comst.*), 419; Pugsley *a.* Aikin, 11 *N. Y.* (1 *Kern.*), 494.) So far as the plaintiff was concerned, he had created a term for two years. It was the defendant's right to shorten the term, and make it into one year. Affirming the lease, as the defendant did, as a lease for two years, he is to be regarded as

having abandoned the demised premises in the middle of his term, compelled to do so by the plaintiff.

VI. The matter of the answer was not only competent as a bar to a recovery, but also as a ground of counter-claim. (*Code*, § 150.) 1. The ground of counter-claim arises "out of the contract or transaction set forth in the complaint." All the cases show that there is an implied obligation on the part of the landlord to abstain from such an interference with his tenant. He must neither spread his annoyance to the premises occupied by his tenant, nor must he use his own premises to the prejudice of the latter. This duty grows out of the very relation of landlord and tenant. 2. The subject of the counter-claim is "connected with the subject of the action." The subject of the action is the alleged agreement of the defendant to pay rent. The subject of the counter-claim is the duty of the landlord (the plaintiff) not to deprive the defendant of the beneficial consideration for which he undertakes to pay rent.

Winchester Britton, for the respondent.—I. There is no allegation in the answer which shows that the injury complained of resulted from any fault of plaintiff. 1. Nothing appears, showing that the evil complained of did not result from the improper condition of that portion of the pipes upon defendant's premises which were used by him (such pipes being common to both), there being no allegation that these pipes were exclusively used for account of the premises of plaintiff. 2. It does not appear but that the condition of the pipes actually existed when the tenancy commenced, and suffering it so to continue would be no eviction, nor would it constitute any basis for recoupment or set-off, or even an affirmative cause of action, there being no express covenant to repair in the lease, and none can be implied. (*Speckels a. Sax*, 1 *E. D. Smith's C. P. R.*, 253; *Etheridge a. Osborn*, 12 *Wend.*, 529; *Tayl. Landl. & T.*, §§ 327, 343.)

II. Defendant cannot claim a reduction of the rent for any act of mere *trespass* by the landlord, diminishing his beneficial enjoyment of the premises, not constituting an eviction. 1. The damages alleged do not arise out of the contract or transaction between the parties, nor are they connected with the subject of the action, and the acts complained of are as independent of the contract or transaction between the parties as any trespass or

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other act of force committed by a stranger upon the tenant. The landlord's duty, claimed to have been violated, did not arise out of any contract between the parties, but that which the law imposes upon every member of community. Damages for a wilful trespass by the landlord upon the tenant cannot be the subject of set-off against a claim for rent; nor can damages for a trespass, not constituting a breach of the contract declared on, be recouped; nor are they the subject of a counter-claim. (*Cram a. Dresser*, 2 *Sandf.*, 120, 127; *Levy a. Bend*, 1 *E. D. Smith's C. P. R.*, 169; *Drake a. Cockcroft*, 10 *How. Pr. R.*, 377; *Mayor, &c., of New York a. Mabie*, 2 *Duer*, 411.) 2. There is no breach of the contract declared on, as the implied covenant for quiet enjoyment is at most only a warranty of possession under title in the lessor, and that the tenant shall enjoy such possession undisturbed (see *Woodf. Landl. & T.*, 318), and is not broken by a trespass, but by an eviction only, or by an entry under an assumption of title. (*Holden a. Taylor*, *Hobart*, 12; *Levi a. Stephenson*, 5 *Bing. N. C.*, 183; *Woodf. Landl. & T.*, 412; *Waldron a. McCarty*, 3 *Johns.*, 472; *Kertz a. Carpenter*, 5 *Ib.*, 121; *Etheridge a. Osborn*, 12 *Wend.*, 529; *Watt a. Coffin*, 11 *Johns.*, 495; *Levi a. Bend*, 1 *E. D. Smith's C. P. R.*, 169; *St. John a. Palmer*, 5 *Hill*, 601; *Drake a. Cockcroft*, 10 *How. Pr. R.*, 377; *Dart's Vend. & P.*, 367, *note*; *Mayor, &c., of New York a. Mabie*, 13 *N. Y.* (3 *Kern.*), 151.)

III. There are no facts alleged showing any entry, under an assumption of title, by the landlord, nor an eviction; but, on the contrary, the answer shows there was no eviction. 1. While it is admitted that if a tenant is evicted by the landlord from any part of the demised premises, the obligation, under the lease, to pay rent, ceases; and though the tenant occupy the residue of the premises, yet he incurs no liability for rent therefor under the lease, as such eviction debars the recovery of any rent until the possession of the whole premises is restored (*Smith a. Raleigh*, 3 *Camp.*, 513; *Lewis a. Payne*, 4 *Wend.*, 423; *Terle a. Terle*, 24 *Ib.*, 76; *Lawrence a. French*, 25 *Ib.*, 453; *Dyett a. Pendleton*, 8 *Cow.*, 731; *Hegeman a. McArthur*, 1 *E. D. Smith's C. P. R.*, 147; *Christopher a. Austin*, 11 *N. Y.* (1 *Kern.*), 216; *Tayl. Landl. & T.*, 183, 184);—and while, 2. An actual entry and physical expulsion is not necessary to constitute an eviction; but it is enough that there is an interference by the

landlord with, or a disturbance of, the tenant's possession, depriving him of the beneficial enjoyment or use of the demised premises, rendering their further occupation impossible, or injurious beyond pecuniary computation and compensation (*Dyett a. Pendleton*, 8 *Cow.*, 727; *Ogilvie a. Hull*, 5 *Hill*, 52; *Cohen a. Dupont*, 1 *Sandf.*, 260; *Tayl. Landl. & T.*, 443; *Cram a. Dresser*, 2 *Sandf.*, 120; *Campbell a. Shields*, 11 *How. Pr. R.*, 565; *Gilhooley a. Washington*, 4 *N. Y. (4 Comst.)*, 217); yet, 3. Such interference or disturbance produces no eviction before the tenant leaves the premises. The tenant cannot be evicted and still occupy. To suppose that he can, involves an absurdity and a contradiction in terms. He must be put out of possession, expelled from either a part or the whole. (*Hunt a. Cope*, *Cowp.*, 242; *Reynolds a. Buckle*, *Hobart*, 326; *Jones a. Boddington*, *Comberb.*, 380; *Burhall a. Lechmere*, 1 *Ld. Raym.*, 370; *Bul-ler's Nisi Pr.*, 177; *Salmon a. Smith*, 1 *Wms. Saund.*, 204, *n.* 2; *Harrison's Case*, *Clayt.*, 34; *Roher a. Seyd*, *T. Jones*, 148; *Page a. Parr*, *Styles*, 432; *Cibels a. Hills*, 1 *Leon.*, 110; *Arnold a. Fort*, 3 *Keble*, 453; *Wilson a. Smith*, 5 *Yerg.*, 399; *Jackson a. Eddy*, 12 *Misso.*, 209; *Cowie a. Goodwin*, 9 *Carr. & Payne*, 378; *Dyett a. Pendleton*, 8 *Cow.*, 727; *Cram a. Dresser*, 2 *Sandf.*, 120; *Campbell a. Shields*, 11 *How. Pr. R.*, 565; 3 *Kent's Com.*, 464, 4th ed., *note*; 7th ed., 574, *note*; *Gilhooley a. Washington*, 4 *N. Y. (4 Comst.)*, 217; *St. John a. Palmer*, 5 *Hill*, 599; *Bennett a. Bittle*, 4 *Rawle*, 339; also, other cases cited in opinion of DALY, J., below.) The true doctrine in this State is, that when there is an actual expulsion from the possession of the premises, or from any portion thereof, or such an interference with the beneficial enjoyment as to justify the departure of the tenant, and he abandons the possession before the expiration of his term, there is an eviction; but, where there is simply an intrusion upon the premises, or a destruction of property thereon, or an injury to the enjoyment resulting from molestation or disturbance, the tenant still retaining entire possession, there is only a trespass. (*Dyett a. Pendleton*—which is the leading case sustaining constructive eviction, and has gone to the verge; see *Ogilvie a. Hull*, 5 *Hill*, 52; and *Gilhooley a. Washington*, 4 *N. Y. (4 Comst.)*, 219, 222,—decides no more than is laid down in the above proposition. See *Jackson a. Eddy*, 12 *Misso.*, 209.) No case of eviction can be found re-

ported where the tenant was not deprived of the possession of the demised premises, or some portion thereof. In *Dyett a. Pendleton*, the tenant left; and the reported opinions of the respective members of the court show that the question before the court was not, whether a tenant could be evicted from, and retain possession of, the entire premises, but whether he could be evicted without an actual entry and actual expulsion? (Opinion of SPENCER, 728, 734; opinion of CRABY, 735, 739.) Constructive eviction means eviction by constructive entry and force, as contradistinguished from actual, physical entry and forcible expulsion, and relates to the manner in which the expulsion or eviction is accomplished, and not to the fact whether or not it was accomplished at all. 4. The tenant in this case did not leave until after the expiration of the term; and, by the terms of the contract, the rent had fallen due, and abandoning at such a time could constitute no bar to an action for the rent for that term. (*McCarty a. Hudson*, 24 *Wend.*, 293; *Cohen a. Dupont*, 1 *Sandf.*, 364; *Whitney a. McKeon*, 3 *Den.*, 452; *Lafarge a. Halsey*, 1 *Bosw.*, 171.) 5. But if defendant had left, there would in this case have been no eviction. There was no interference with the possession, and no disturbance of the beneficial enjoyment, not entirely capable of computation and compensation in damages as for any trespass. There was no expulsion, either moral or physical, and a mere molestation or disturbance constitutes no eviction. (*Carpenter a. Parker*, 91 *Eng. Com. L. R.*, 205, 242.)

IV. No damage can be claimed or recouped for breach of covenant of renewal, for there is no allegation of a demand, or refusal, to renew. Besides, if plaintiff had actually driven defendant from the premises at the time alleged, it would have been no answer to an action for rent for the preceding term. (*Etheridge a. Osborn*, 12 *Wend.*, 529; *Kessler a. McConachy*, 1 *Rawle*, 435; *Giles a. Comstock*, 4 *N. Y.* (4 *Comst.*), 270; *Lafarge a. Halsey*, 1 *Bosw.*, 171.)

BY THE COURT.—GROVER, J.—The demurrer presents two questions: 1. Whether the facts alleged in the answer constitute a defence? 2. Whether they constitute a counter-claim, available to the defendant by way of recoupment or otherwise, in this action? The rule has long been settled, that a wrongful eviction of the tenant by the landlord, from the whole or any

part of the demised premises, before the rent becomes due, precludes a recovery thereof until the possession is restored. (Christopher *a.* Austin, 1 *Kern.*, 217.) Whether this eviction must be actual, by the forcible removal of the tenant, by the landlord, from the demised premises or a portion thereof, was not settled in this State until the case of Dyett *a.* Pendleton (8 *Cow.*, 728). In that case the principle was established by the Court for the Correction of Errors, that when the lessor created a nuisance in the vicinity of the demised premises, or was guilty of acts that precluded the tenant from a beneficial enjoyment of the premises, in consequence of which the tenant abandoned the possession before the rent became due, the lessor's action for the recovery of the rent was barred, although the lessor had not forcibly turned the tenant out of possession. Ever since that case, this has been considered as a settled rule of law binding upon all the courts of this State. Such acts of the lessor, accompanied by an abandonment of the possession by the lessee, is deemed a virtual expulsion of the tenant, and, equally with an actual expulsion, bars the recovery of rent. The reason of the rule is, that the tenant has been deprived of the enjoyment of the demised premises by the wrongful act of the landlord, and thus the consideration of his agreement to pay rent has failed.

In case of an eviction from a portion of the premises, the law will not apportion the rent in favor of the wrong-doer. In this case, the answer shows that the defendant continued to occupy the premises for the whole time for which the rent demanded accrued. In this the case differs from Dyett *a.* Pendleton (*supra*). I cannot see upon what principle the landlord should be absolutely barred from a recovery of rent, where his wrongful acts stop short of depriving the tenant of the possession of any portion of the premises. The injury inflicted may be to an amount much larger than the whole rent, or it may be of a trifling character. In all the cases where it has been held that the rent was extinguished or suspended, the tenant has been deprived, in whole or in part, of the possession by the wrongful act of the landlord, either actually or constructively.

There is no authority extending the rule beyond this class of cases. It would be grossly unjust to permit a tenant to continue in the possession of the premises, and shield himself from the

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payment of rent by reason of the wrongful acts of the landlord, impairing the value of the use of the premises to a much smaller amount than the rent. This must be the result of the rule claimed by the defendant. The moment it is conceded that the injury must be equal to the amount of the rent, the rule is destroyed. It would then only be a recoupment to the extent of the injury. In *Ogilvie v. Hull* (5 *Hill*, 52), NELSON, Chief-justice, in giving the opinion of the court, says "that no general principle is better settled or more uniformly adhered to, than that there must be an entry and expulsion of the tenant by the landlord, or some deliberate disturbance of the possession, depriving the tenant of the beneficial enjoyment of the demised premises, to operate as a suspension or extinguishment of the rent." The rule contended for by the defendant is a very different one, suspending or extinguishing the rent whenever the enjoyment, in consequence of the tortious acts of the lessor, becomes less beneficial than it otherwise would have been. The true rule from all the authorities is, that while the tenant remains in possession of the entire premises demised, his obligation to pay rent continues.

The remaining question is, whether a counter-claim, arising from the facts contained in the answer, is available to the defendant in this action? By section 149 of the Code, the defendant is permitted to include in his answer new matter constituting a counter-claim. Section 150 defines the class of demands which are embraced in section 149. A counter-claim must be, 1st. A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action; or, 2d. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.

The demand of the defendant, set out in the answer, does not arise out of the contract set forth in the complaint. That contract is for the payment of rent upon a lease of the demised premises. The defendant's demands arise from the wrongful acts of the plaintiff, in permitting water to leak and run into the premises, and in causing or permitting it to be thrown upon the premises and property of the defendant. These acts are entirely independent of the contract of leasing, upon which the action

is brought. The demands are not connected with the subject of the action. *That* is the rent agreed to be paid for the use of the premises. The defendant's demands are for a series of injuries to his property deposited upon the premises, and for impairing the value of the possession. It would be a very liberal construction to hold that, in an action for rent, injuries from trespasses committed by the lessor upon the demised premises might be interposed as a counter-claim. The acts of the plaintiff in this case, are of a similar nature. They are either acts of trespass or negligence, from which the injuries to the defendant accrued. Such a construction could only be supported by the idea that the subject of the action was the value of the use of the premises. But when there is an agreement of the parties fixing the amount of rent, that value is immaterial. Unless the acts of the defendant amount to a breach of the contract of letting, they are not connected with the subject of the action.

In the case of *The Mayor of New York v. Mabie* (3 *Kern.*, 151), it was held by this court, that a covenant for quiet enjoyment by the lessee was implied in a lease under seal for a term not exceeding three years, *since*, as well as before, the Revised Statutes; that this covenant was broken by interference with possession by the lessor, under a claim of right. Consequently, that damages sustained from such acts might be recouped in an action for rent. It was remarked by DENIO, J., in giving the opinion in that case, "that it is not, however, every mere trespass by the lessor, upon the demised premises, which will amount to a breach of this covenant. Although the covenantor cannot avail himself of the subterfuge that his entry was unlawful, and he, therefore, a trespasser, to avoid the consequences of his own wrong, still, to support the action of covenant, the entry must be made under an assumption of title." For this the learned judge cites *Platt on Covenants*, 319, 320. There is nothing in this case tending to show that any of the acts of the plaintiff were done under any claim of right whatever. They did not, therefore, amount to a breach of the contract created by the lease; and the injuries sustained by the defendant do not, therefore, constitute a counter-claim connected with the subject of the action.

The judgment should be affirmed.

Dwight a. Webster.

DWIGHT a. WEBSTER.

Supreme Court, First District; At Chambers, January, 1860.

FORECLOSURE.—DEFAULT IN INTEREST CLAUSE.

The fact that when an instalment of interest became due, the mortgagor was unable to find the mortgagee until after the period required for the payment of interest, in order to prevent the principal from becoming due, is not, in the absence of any fraud shown in the plaintiff, a defence to a foreclosure of the mortgage for payment of the principal. So held, on motion to be let in to defend on that ground after judgment of foreclosure by default.

Motion to open judgment by default.

The facts are stated in the opinion.

LEONARD, J.—This action is brought to foreclose a mortgage, containing a clause making the whole principal sum due, in case the interest shall remain unpaid for a certain number of days after it has become due.

The complaint alleges a default in the payment of the interest under this clause.

The answer admits this default, but alleges, as an excuse, that the defendants were unable to find the holder of the mortgage until after the period required for the payment of interest, in order to prevent the whole principal from becoming due, had expired. A judgment by default has been taken at special term, which the defendants now apply to the court to set aside.

If the answer set up a valid defence, the motion ought to prevail.

The answer does not allege any trick or fraud on the part of the plaintiff to prevent the payment of interest. It simply presents the misfortune of the defendants in being unable to find the plaintiff in season.

This does not present any fault on the plaintiff, which would prevent him from insisting on a fulfilment of the terms of the

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mortgage. Nor is it such an accident or misfortune as will enable the court to afford the defendants any relief.

The case of *Ferris v. Ferris* (16 *How. Pr. R.*, 102) is decisive of this question.

It is not necessary to refer to the other facts contained in the affidavits, as the view which I have taken of the answer is conclusive against the legal force of the whole defence.

HICKS *v.* CHARLICK.

Supreme Court, First District; Special Term, February, 1860.

DISCOVERY AND INSPECTION.—DENIAL OF POSSESSION.

An affidavit to resist a motion that books and papers be deposited for inspection, on the ground that the affiant has not possession of them, is not sufficient if it is evasive in not showing how he parted with possession.

Order to show cause why plaintiff should not have discovery and inspection of certain documents.

On petition of the plaintiff and accompanying affidavit, stating that a certain agreement made between plaintiff and others and defendant Charlick, on or about the 22d of July, 1853, with a power of attorney annexed, was delivered to the defendant on the understanding that he should furnish a copy thereof to plaintiff, which he had not furnished; that a certain ferry-lease and assignment thereof made by the plaintiff pursuant to the agreement, were, on or about the 22d of August, 1853, delivered to the defendant; and that it was necessary that the papers be deposited, and that plaintiff's attorneys be permitted to examine them, an order was made requiring the defendant Charlick to discover and deposit those papers with the Clerk of the Court for the term of five days, or to show cause why the order should not be made absolute. The defendant now showed as cause, by his own affidavit, that he "has made diligent search therefor, and has been unable to find any such papers or documents, and

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that the same are not now in his possession or under his control, and thus deponent is unable, from any knowledge he has, to produce the papers in Court referred to in said petition and affidavits," and thereupon asked that the order be discharged.

BONNEY, J.—This application for discovery is made under 2 Revised Statutes, 199, section 21, &c. The third subdivision of section 24 provides that such an order may be vacated, "upon the party required to make the discovery denying, on oath, the possession or control of the books, papers, or documents ordered to be produced."

The defendant admits (by not denying) the statements in plaintiff's petition, that the papers in question were delivered to him in July and August, 1853. He does not state that he has ever parted with the possession of the papers, or has destroyed, lost, or mislaid them. His statement is, that he has made diligent search therefor (without stating when or where he made such search), and has been unable to find any such papers or documents; and that the same are not now in his possession, &c., and that he is unable, from any knowledge he now has, to produce them. The affidavit appears to me to have been drawn with much caution and carefully qualified, and to be evasive. Let an absolute order, drawn in conformity with the rules of the court, now be entered, to be settled on not less than two days' notice.

CHARLICK *a.* THE FLUSHING R. R. COMPANY.

Supreme Court, First District; Special Term, February, 1860.

DISCOVERY AND INSPECTION.—BOOKS, &c., OF A CORPORATION.

A petition for a discovery should be denied where it appears that the petitioner might have access to the books and papers without an order—*e. g.*, where it appears that he is one of the directors of a corporation to which the books and papers belong, and that the custodian of them holds them subject to the control of the board thereof.

Charlick *a.* The Flushing R. R. Company.

Petition for a discovery.

BONNEY, J.—Joseph W. Allen, one of the defendants in this action, applies by petition, under the Revised Statutes, 199, section 21, for an order that David S. Williams and William Stuart, co-defendants, produce and deposit in the office of the Clerk of Queen's County certain books of the Flushing Railroad Company, stated to be in their possession, and the examination of which is alleged to be necessary to enable the petitioner to prepare his defence.

The petitioner does not state that he has ever asked permission to examine said books, or that they have ever been refused, or in any way kept from him.

The defendant Stuart denies that he has any possession or control of the books. The defendant Williams, by affidavit, states that some books and papers of the company have been left in his possession for safe keeping; that he holds and always has held them subject to the control and orders of the Board of Directors of the Company, of which Board the petitioner is a member; that the petitioner could at any time have had free access to said books and papers, but has never applied to him (Williams) to see them, nor expressed any wish or desire to see them, nor requested copies thereof, or of any entries therein. Upon the papers before me, the application must clearly be denied. The defendant Williams is shown to be merely the custodian of the books and papers for the Railroad Company; and the petitioner, a member of the Board of Directors of the Company, may examine and copy them when and as he pleases. The application appears to have been wholly unnecessary.

Motion denied, with \$10 costs to respondents Williams and Stuart.

STEINMAN *a.* CLARK.*New York Common Pleas; Special Term, April, 1859.*

PLEADING.—ANSWER OF JUSTIFICATION OF SLANDER.

An answer to a complaint for slander, which shows that defendant was informed and believes the charges were true; that the offences charged were in fact committed, and, as defendant believes, by the plaintiff; and disavowing malice in making the charges,—is sufficient, as a justification.

Motion to strike out a defence, or make it more definite and certain.

The complaint was for slander. The words alleged to have been uttered by defendant were specific charges, of having committed thefts from the defendant of various articles of property mentioned, and of practising prostitution, specifying instances of illicit intercourse.

The third defence in the answer was as follows: "That the defendant had had taken and stolen from her each and every article in the complaint mentioned as having been charged by defendant to have been stolen by the plaintiff; and the defendant is informed and believes that the plaintiff has been and is guilty of each and every charge in said complaint alleged to have been made against her by the defendant; and that whatever the defendant has said of or concerning the plaintiff, she has said in the full belief of its truth and verity, and in self-vindication and warning to others, and not from any motives of malice towards the plaintiff."

This defence plaintiff now moved be stricken out as irrelevant and redundant, or be made more definite and certain.

Clegg & Semler, for the motion, urged that the allegations were not sufficient as a justification, citing *Ormsby a. Douglass* (2 *Abbotts' Pr. R.*, 407); *Sayles a. Wooden* (6 *How. Pr. R.*, 84); *Jaydock a. Ayres* (7 *Id.*, 215); *Bush a. Prosser* (13 *Barb.*, 221); *Van Santv. Pl.*, 484.

Gassett *a.* Crocker.

Chatfield, Hadley & Briggs, opposed.

HILTON, J.—The matter complained of in the answer cannot be considered either irrelevant or redundant.

It is asserted by the defendant, in brief, that what she did say of the plaintiff was not from any malicious motives, but because she has been informed and believes that every charge contained in the complaint, alleged to be slanderous and uttered by the defendant, is true. That she had the property in the complaint referred to, that it was stolen from her, and she believes it was stolen by the plaintiff.

This would seem to be sufficiently definite to enable the plaintiff to understand the precise nature of the defence relied upon.

It contains what may be considered a justification of the alleged slander, with mitigating circumstances tending to disprove malice, and although the plaintiff may desire more particularity, yet I do not understand how she can be gratified. Certainly, it will be a sufficient defence if the defendant proves a justification as full and as broad as the charge; and if she should fail in so doing, under the decisions in *Bush a. Prosser* (1 *Kern.*, 347), and *Bisbey a. Shaw* (2 *Ib.*, 67), the evidence offered for the purpose may be relied on to disprove malice. The answer seems to me sufficiently definite and certain to permit defences of the kind suggested, and is not open to the plaintiff's objection. (*Code*, § 160.)

Motion denied, with \$10 costs to defendant to abide event.

GASSETT *a.* CROCKER.

New York Common Pleas; Special Term, July, 1859.

PLEADING.—WAIVER OF DEFECT OF PARTIES.

If an objection which ought to be taken by demurrer—*e. g.*, that a defect of parties appears on the face of the complaint—is taken only by an allegation in an answer, it will be deemed to have been waived; and the allegation may be struck out of the answer on motion.

Osgood *a.* Whittelsey.

Motion to strike out part of an answer.

The answer in this action alleged, among other things, that certain third persons, whose interest in the subject-matter of the action appeared from the complaint, were necessary parties to the action, and that a complete determination of the controversy could not be had without their presence.

This part of the answer the plaintiff moved be stricken out.

A. F. Smith, for the motion.

Leonard & Hoffman, opposed.

HILTON, J.—The part of the defendants' answer which the plaintiffs ask to have stricken out, is, in substance, a demurrer to the complaint for a defect of parties.

As the alleged defect appears on the face of the complaint, if the defendants desired to avail themselves of it, they should have taken advantage of it by a demurrer. (*Code*, §§ 143, 147, 148.) Not having done so, they must, after answer, be deemed to have waived all objections to it.

The allegation, therefore, constitutes no defence to the action, is clearly irrelevant, and should be stricken out.

Motion granted, with costs.

OSGOOD *a.* WHITTELSEY.

Supreme Court, Second District; Special Term, February, 1860.

PLEADING.—DEMURRER.—LEAVE TO ANSWER.—COMPLAINT
AGAINST SURETY ON NOTE.

Where a demurrer is interposed which the pleader could not have supposed would dispose of the case on the merits, it cannot be deemed to have been put in in good faith.

*affirmed
20 Nov. 72.*

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After putting in such a demurrer, and after failing to avail himself of leave obtained to withdraw it and answer, a motion for an order granting him such leave should not be made, unless the defendant shows a meritorious defence.

Form of a sufficient complaint on a promissory note, in an action against a maker and a surety.

Motion for judgment, and motion for leave to answer.

The action was on a promissory note. The allegations of the complaint were as follows :

“That Samuel W. Whittelsey, and William Whittelsey as his security, on the 30th day of December, 1836, at the city of New York, made their promissory note in writing, whereby they promised to pay to Friend Whittelsey or order, ninety days after date, three hundred dollars, for value received.

“And said plaintiff further shows, that on the 14th day of February, 1837, at the said city of New York, the said defendant Samuel W. Whittelsey, and William Whittelsey as his security, made their certain other promissory note in writing, which they promised to pay to Friend Whittelsey or order, three hundred dollars, ninety days after date, for value received.

“And the said payee thereof indorsed the said two promissory notes to the above-named plaintiff; and that when the said notes became due and payable, they were duly presented for payment to the defendant Samuel W. Whittelsey, and payment thereof was duly demanded; but the same were not paid, nor either of them, and that due notice thereof was given to the defendants William Whittelsey and Friend Whittelsey.

“And the said plaintiff further shows, that at the time when the said promissory notes became due and payable, the defendant William Whittelsey was not a resident or within the State of New York, and the jurisdiction of this Court, and has continued without the said State until within a short time past.

“And said plaintiff further shows, that he is now the lawful owner and holder of the said two promissory notes; that the same are not paid, nor any part thereof, and that the defendants are, and each of them is, indebted to him thereupon, in the sum of six hundred dollars principal, together with lawful interest

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thereon, from the date when the same became due and payable respectively.

“Wherefore,” &c.

The defendant William Whittelsey demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. He subsequently obtained a consent that he might withdraw the demurrer and answer, but he failed to do so within the time limited.

The plaintiff now moved for judgment on the pleadings, on account of the frivolousness of the demurrer. The defendant William Whittelsey at the same time moved for leave to withdraw the demurrer, and put in an answer. His proposed answer was not served with the motion papers; but the grounds of his defence were stated in his affidavits, and they appear in the opinion of the Court.

Charles S. Webb, for the plaintiff.—I. The defendant should not be let in to set up limitations, cited *Morris a. Slatery* (6 *Abbott's Pr. R.*, 75); *Coit a. Skinner* (7 *Cow.*, 401); *Halligan a. Golden* (1 *Wend.*, 302); *Jackson a. Varnish* (2 *Wend.*, 394); *Havens a. Hoyt* (11 *How. Pr. R.*, 454); *Walcott a. McFarlan* (6 *Hill.*, 227).

II. The demurrer is palpably frivolous. It should be regarded as interposed for delay. (*Darrow a. Miller*, 5 *How. Pr. R.*, 247.) The Court has now no power to allow an answer to be put in. (*Shearman a. N. Y. Central Mills*, 1 *Abbott's Pr. R.*, 190; *Marquise a. Brigham*, 12 *How. Pr. R.*, 400.)

Gilbert Dean, for the demurrant.

Lorr, J.—The case relied on by the counsel of the defendant in support of the demurrer (*Butler a. Rawson*, 1 *Den.*, 105), has no application to this. That was an action on the money-counts, and not on the note itself; and it appeared on the trial that the note which was offered to sustain the claim was signed by Rawson as surety. A verdict was rendered for the plaintiff, and a new trial was ordered, on the ground that it was necessary to declare specially on the instrument on which it was sought to charge the surety; and that a recovery could not be had against him on the money-counts. This was declared to be upon the

principle that, in the common case of a suit against the makers of a promissory note, the instrument might be given in evidence under the money-counts, for the reason that the note is evidence of money lent to or had, and received by the makers to the plaintiff's use; but when one of them signs as surety for the other, and that fact appears on the face of the instrument, the note furnishes no evidence that he received the whole or any part of the consideration, but, on the contrary, it shows that the principal had received the whole consideration. In the present case the action is based on the note itself, and comes within the rule there laid down, and is moreover expressly authorized by section 120 of the Code. There appears, therefore, to be no ground whatever for the demurrer.

Nor can I find sufficient on the facts declared to justify its withdrawal, and to permit the defendant to interpose an answer. Conceding it to be true that the pleader interposed it in the honest belief that it might be available, yet it clearly could not have been done on the expectation of disposing of the cause on *its merits*. It, therefore, to use the language of the court, SUTHERLAND, J., in *Patten v. Harris* (10 *Wend.*, 623), "cannot well be said to have been put in in good faith." It, moreover, appears that the defendant's attorney, after obtaining the privilege of withdrawing it, and putting in an answer, voluntarily waived it. Under these circumstances the case does not present any claim to the interference of the court, unless it is made reasonably to appear that there is in fact a valid defence. This is not shown. There is no pretence that the notes, or either of them, have been paid in fact. The grounds urged are, that the surety has been discharged by an extension of time to the principal, granted "on the payment of the interest," and that the payee of the note petitioned for discharge of the principal under the insolvent act. The mere promise to extend the time of payment on receiving part of the debt, is not such an extension as to discharge the surety. There must be some new consideration for the promise. This is fully decided in *Reynolds v. Ward* (5 *Wend.*, 501), which presents many facts and circumstances similar to the one under consideration. (See also *Draper v. Romeyn and Bade*, 18 *Barb.*, 166.)

So far as the case is affected by the discharge of the principal under the insolvent act, it is shown by the affidavit of Mr.

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Webb, that William Whittelsey himself also assented to the discharge, and was one of the petitioning creditors. It is also stated, in the affidavits read in opposition to this motion, that the notes had in fact been indorsed over and transferred before those proceedings in insolvency. This is confirmed by the fact, also stated by Mr. Webb, that he finds on examination of those proceedings, that no mention of or reference to those notes is made. Other circumstances are also set forth tending to show that this ground of defence is untenable, but it is unnecessary to refer to them. The result is, that there is no reasonable foundation for the belief that either of those grounds of defence can be available. There is, it is true, an apparent defence growing out of lapse of time. It is stated, however, in the complaint, that when the notes became due and payable, "the defendant William Whittelsey was not a resident, or *within* the State of New York, and *the jurisdiction of this court, and has continued without the said State, until within a short time past.*" This allegation is met only by the defendant in a statement contained in his affidavit, "that deponent has been a resident of the State of New York for more than twenty-five years last past;" and, also, "that ever since said notes were given, he has been a constant resident of the State of New York, and is now such a resident." There is, therefore, a fair and reasonable ground for the assumption that the notes are not in fact barred by the statute of limitations. But if it were otherwise, it would not be an exercise of a sound discretion to permit that defence to be interposed—when it is not denied, but is in effect conceded that the debt has not in fact been paid. Under all the circumstances, it appears to me to be a case where substantial rights are sought to be defeated by a technical defence, and where the plaintiff should be allowed to realize the debt justly due to him, and to which he has become entitled in the due and regular course of legal proceedings.

Krauth *a.* Vial.

KRAUTH *a.* VIAL.*affirmed
9 May. 1851**New York Common Pleas; At Chambers, February, 1859.*

ARREST UNDER THE ACT TO ABOLISH IMPRISONMENT FOR DEBT.

The defendant in an execution—a foreigner—was informed by the officer who levied upon his property, that certain articles which among others he produced to the officer, were exempt from seizure on execution, and he, thereafter, removed them openly from the State.

Held, that these circumstances did not amount to removing and secreting property with intent to defraud creditors, within the meaning of the non-imprisonment act.

This was a proceeding under the act to abolish imprisonment for debt, and to punish fraudulent debtors. (*Laws of 1831, 396.*) The petition for a warrant against the defendant set forth a judgment against him, and charged that he had money in his possession which he unjustly refused to apply to the payment of the judgment, and also that he had removed and secreted property belonging to him with intent to defraud his creditors. In regard to the second charge, the affidavit of the petitioners stated that, after the judgment was obtained, he secretly removed two horses and a baker's cart, belonging to him, to Jersey City, and there secreted them; and also alleged the execution by him of a fraudulent mortgage intended to cover his property from his creditor's reach.

A warrant was issued, and on its return the defendant put in an affidavit alleging that, on an execution issued by the plaintiff on the judgment, a large part of the judgment had been collected. He denied also that he had money in his possession which he unjustly refused to apply to the payment of the judgment; and alleged that such small sums as his wife and himself had collected from those owing him, he had applied in payment of workmen and in support of his family.

His affidavit further set forth that at the time of the levy of the execution, he the defendant showed the sheriff who made it the two horses and wagon mentioned in the plaintiff's affidavit,

Krauth & Vial.

but that the sheriff refused to levy upon them, stating that they were exempt by law from execution. His removal of them from the State he explained by stating, that he rode over with his wife to take the cars in Jersey City for an excursion ; that he left the team, openly, in a public stable, and that while it was there it was seized by the sheriff of the county at the suit of the plaintiff and others.

The evidence taken before the judge showed, that when the defendant went to the stable in Jersey City he drove one horse harnessed to the cart, and led the other ; and that he authorized the keeper of the stable to sell one of the horses for not less than a fixed sum ; that he went in open day, and that his name appeared on the cart in large letters.

J. A. Sherwood, for the plaintiffs.

Mr. Bryan, for the defendant.—I. The plaintiffs cannot sustain their proceeding on the ground of a refusal to apply moneys to the payment of their claim. It is the evident intention of the statute that a demand to apply must be made. (*Stewart v. Bidleman*, 2 *Comst.*, 103.)

II. As to the other ground, the evidence shows that the plaintiffs seized a part of the property of defendant on execution here, and that the part which they charge him with secreting, they also seized in Jersey City. If they had disclosed these facts on application, the warrant never should have been granted.

HILTON, J.—The only question which, in my opinion, is presented for determination in the present proceeding under the non-imprisonment act, is, whether the defendant removed the horses and cart to New Jersey with intent to defraud his creditors.

The evidence shows that when the deputy-sheriff made the levy under the execution issued upon the judgment which forms the basis of the present proceeding, he informed the defendant that one horse and the cart were exempt from seizure by him.

This justified the defendant in supposing that he might do with the cart as he pleased ; he was a foreigner, ignorant of our

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language, and naturally would look to the officers of the law as the proper persons to expound it, and under the circumstances shown, I think it would be unreasonable to hold him guilty of any fraudulent intent in respect to the cart.

As to the horses—the sheriff's deputy was half right in saying that the law exempted from levy one horse; he would have been wholly so, had he stated that the exemption extended to a team owned by a person having a family for whom he provides, not exceeding in value \$150. It does not appear that the two horses here referred to exceeded in value this sum; and if they did not, then it is quite clear that the defendant might make any disposition of them he thought proper, without subjecting himself to the suspicion of intending by it to defraud his creditors. (3 *Rev. Stat.*, 5th ed., 646, § 23; *Ib.*, 132, § 32.)

But, apart from these reasons, I think the testimony fails to show a deliberate intent to defraud on the part of the defendant. His conduct, when the officer called to levy with the execution, indicated no special unwillingness to yield up to the law the property liable to be applied in the payment of the judgment, and I do not think his subsequent acts in respect to the property which the officer left, were such as would justify me in declaring him a fraudulent debtor.

Complaint dismissed.

BROCKLEMAN *v.* BRANDT.

New York Common Pleas; Special Term, February, 1859.

PLEADING.—COMPLAINT FOR MALICIOUS PROSECUTION.—SPECIAL
DAMAGE.

In an action for malicious prosecution, the complaint may aver matter tending to show the defendant's motive,—*e. g.*, a malicious publication by him procured to be made concerning the prosecution,—such as would be proper to prove at the trial, as showing special injury.

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Such averments should not be struck out on motion, as the plaintiff cannot be deemed aggrieved by them.

Motion to strike out part of complaint.

The action was for a malicious prosecution and arrest. After setting forth the facts relied on as constituting the wrong complained of, the complaint alleged that the defendant maliciously procured to be published matter concerning the same, which was libellous upon the plaintiff.

These allegations the defendant moved to be stricken out, as irrelevant or redundant.

H. H. Morange, for the motion.—Cited 4 *How. Pr. R.*, 119, and *Eddy a. Beach*, 7 *Abbott's Pr. R.*, 19.

Lane & Roelker, opposed.—Cited 2 *Greenl. on Ev.*, 369, §§ 453, 456; *Bull. N. P.*, 13, 14; *Thompson a. Massey*, 3 *Greenl.*, 305; *Tripp a. Thomas*, 3 *B. & C.*, 427; 2 *Greenl. on Ev.*, § 254; 1 *Chit. on Pl.*, 328, 346, 347 (4th ed.); *Armstrong a. Perry*, 5 *Wend.*, 528, 539; *Molony a. Dows*, 15 *How. Pr. R.*, 265; *Root a. Foster*, 9 *Ib.*, 38; *Hollenbeck a. Clow*, 9 *Ib.*, 295; 1 *Chitt. Pl.*, 425, 397, 398.

HILTON, J.—Although the matter in the complaint which the defendant asks to have stricken out as irrelevant and redundant, contains a statement of facts tending to show the motive of the defendant in the prosecution which is claimed to be malicious, and which might be given in evidence on the trial without being pleaded (*Molony a. Dows*, 15 *How. Pr. R.*, 261); yet it may also be regarded as an averment of special injury, and as such may be necessary to enable the plaintiff to give proof in respect to it.

In either point of view, however, the plaintiff cannot be aggrieved by it, and the motion must therefore be denied.

FARCY a. LEE.

New York Common Pleas; Special Term, March, 1859.

PLEADING ON AN ACCOUNT.—INDEFINITENESS AND UNCERTAINTY.

A complaint referring to an account, according to section 158 of the Code, for the particulars of the claim,—*e. g.*, in an action for work, labor, and services,—is nevertheless indefinite and uncertain, unless its allegations show the nature and character of the claim, and the period within which it arose.

Motion that plaintiff be required to amend his complaint.

The complaint alleged that, heretofore, by request of the wife of the defendant, the plaintiff and her servants performed for the defendant at, &c., “work, labor, and services, and furnished divers materials therefor, at the days and times, and in and about the matters and things, and at the prices, specified in an account already delivered to the defendant in respect thereof, and upon which the defendant paid her on account thereon; and to which account of said work and materials, delivered to the said defendant as aforesaid, she craves leave to refer when the same shall be produced to this court.”

That the defendant thereupon became, and is now indebted, &c., in a balance specified, for which judgment was demanded.

The defendant now moved that the complaint be made more definite and certain, and that the plaintiff be required to state particularly the work, labor, and services rendered, and the materials furnished, and the dates and values thereof.

The affidavits to oppose the motion showed that the items of the account exceeded three hundred in number; that after the account had been rendered, the defendant paid a part, and that he had promised to pay the balance.

L. Spring, for the motion.

Wm. C. Traphagen, opposed.

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HILTON, J.—Although it is not necessary in pleading to set out the items of an account referred to in it, yet in an action for work, labor, services, and materials, the complaint should be so sufficiently definite and certain as to enable the defendant to ascertain from it the nature and character of the claim, and the period within which it is alleged to have arisen. (*Code*, §§ 158, 160.) If more particularity is desired, it can be obtained either by demand, or a judge's order, under section 158.

Tested by these views the complaint is clearly defective. It is so indefinite and uncertain that the precise nature of the plaintiff's claim is not apparent from it. It must be amended, and the defendant will have twenty days to answer after service of it as amended.

*Revised,
2d Jan. 396.*

THE PEOPLE *v.* THE MAYOR, &c., OF NEW YORK.

Supreme Court, First District; Special Term, December, 1859.

ACTION BY THE PEOPLE.—INJUNCTION.—PARTIES.

The attorney-general may maintain an action in the name of the People to restrain a municipal corporation from exercising authority not possessed by it under its charter or by law.

The passage of a resolution by the Common Council of a municipal corporation, is a legislative act, and cannot be enjoined.

But an injunction may be granted to prevent such a resolution from being carried into effect, after it is passed.

In an action brought by the People to restrain a municipal corporation from proceeding under a public contract, required by law to be awarded to the lowest bidder, on the ground that the contractors were not the lowest bidders, the contractors and the bidders need not be made parties.

The clause of the act of 1857 (*Laws of 1857*, ch. 446, § 38)—relating to work necessary to be done to complete or perfect a particular job, &c., for the Corporation of the city of New York—does not include work forming a part of a job, which, in a contract for the residue of the job, appears to have been intentionally excluded, to be let in future, or to be otherwise done.

Of the construction of the specifications in public contracts.

Motion for an injunction.

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The action was brought to restrain the defendants from making or carrying out a contract with Messrs. Fairchild, Walker & Co., for the construction of the gate-houses of the Croton Reservoir. The motion had been once denied without prejudice (see 9 *Ante*, 253), and was now renewed. The facts are fully stated in the opinion, and in our report of the former decision.

T. R. STRONG, J.—It is apparent from the opinion of Justice Ingraham, on the decision of the motion made before him in this case, at special term,* for an injunction, and I have also learned from conversation with him on the subject, that he intended to decide for the purpose of the motion, that the attorney-general has authority to bring an action in the name of the People, to restrain a municipal corporation from exercising authority in making a contract, or performing similar acts, not possessed by it under its charter, or by law. He denied the motion in respect to a restraint to that extent in this case, on the ground it did not appear that defendants were about to do the acts of that nature stated in the complaint, except upon information and belief, which was not sufficient. This defect existed in the plaintiff's papers, but it appears to have been supplied by papers introduced by the defendants, and the fact to have escaped the attention of the court. The further papers now produced by the plaintiffs remove this ground of objection.

On this renewal of the motion, in pursuance of the leave given therefor, I shall not examine the question as to the right of the attorney-general to bring this action, but shall follow the decision of Justice Ingraham on that point, and allow the plaintiffs an injunction, if they have made a case in other respects which calls for such an interposition by the court.

The prayer of the complaint is, that the action of the defendants, in passing a resolution directing the Croton Aqueduct Board to have the gate-houses, aqueduct, and their appurtenances, for the new reservoir, constructed by Fairchild, Walker & Co., under the contract made with them the 2d of April, 1858,

* 9 *Ante*, 253.

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&c., be adjudged to be without authority and a usurpation of power; and that the defendants be enjoined from passing the resolution, or any resolution, directing the work to be done by those persons, or any person, except the same be awarded in the ordinary way upon sealed bids made in pursuance of notice; that the defendants also be enjoined from employing said persons, or any person, to construct said work; and that the defendants be prohibited from carrying out the provisions of said resolution. It is set forth in the complaint, that the resolution had been passed by the Board of Councilmen and the Board of Aldermen, that it had been vetoed by the mayor, and readopted by the Board of Councilmen by a vote of sixteen to three, and that the same was before the Board of Aldermen for their concurrence. The other papers now before the court, show that the resolution was again passed by the Board of Aldermen on the 5th of September, 1859, the same day the complaint was verified, two-thirds of all the members elected having voted therefor, whereby it became adopted.

It was held by Justice Ingraham, that passing the resolution was a legislative act, and that the defendants could not be enjoined from any legislation they might deem proper; and following that decision, aside from the facts that the resolution has passed, and is in force as far as it could be made operative by the defendants, I shall hold that an injunction against the passage of the resolution cannot be granted.

In regard to the residue of the relief sought, that the defendants be enjoined from employing Fairchild, Walker & Co., or any person, to construct the work mentioned in the resolution, and that the defendants be precluded from carrying out the provisions of the resolution, several questions have been raised which must be considered.

The theory of the complaint being, that the defendants are about to carry out the resolution by employing Fairchild, Walker & Co., to do the work without lawful authority, and to the injury of the public, I perceive no reason why any persons should be united with the present plaintiffs or defendants as parties to the action.

Baldwin & Jaycox, to whom as the lowest bidders, in pursuance of due notice inviting proposals, the Croton Aqueduct Board awarded the contract for constructing the gate-houses, pipe-cham-

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ber, and aqueduct, on the 27th of October, 1858, have no right to the work under the award before confirmation of the contract by the defendants. (*Laws of 1857*, ch. 446, §§ 32, 33; *Ordinances of N. Y. City of 1855*, § 494; *The People ex rel. Dinsmore a. The Croton Aqueduct Board*, 6 *Abbotts' Pr. R.*, 42.) But if it were otherwise, and their rights should be infringed, they would have an ample remedy by action. They have not a pretence of claim to an injunction, and nothing is demanded injurious to their interests.

Fairchild, Walker & Co. have no interests, legal or equitable, involved in the litigation. So far as their contract for constructing the reservoir embraces the work in question, it is not sought to be, and will not be, affected by the result of this action. They will be entitled to perform their contract, and to damages if the contract is violated by the defendants. Their rights under their contract are in no way in question to their prejudice; and they have no rights under the resolution directing the Croton Aqueduct Board to employ them to do the work specified in it.

It is claimed by the defendants, that they have the power to give this work to Fairchild, Walker & Co., without any letting or contract, by a three-fourths vote, under section 38 of the *Laws of 1857*, ch. 446. That section, after providing that all contracts to be made or let by authority of the Common Council, for work to be done or supplies to be furnished, shall be made by the appropriate heads of departments, under such regulations as shall be established by the Common Council, proceeds: "Whenever any work is necessary to be done to complete or perfect a particular job, or any supply is needful for any particular purpose, which work and job is to be undertaken or supply furnished for the Corporation, and the several parts of said work or supply shall together involve the expenditure of more than \$250, the same shall be by contract, under such regulations concerning it as shall be established by ordinance of the Common Council, unless by a vote of three-fourths of the members elected to each board it should be ordered otherwise." The section next provides that all contracts shall be entered into by the appropriate heads of departments, and shall be founded on sealed bids, &c. Assuming that the contract of Fairchild, Walker & Co. does not embrace the gate-houses, &c.,

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I do not think that work can properly be regarded "work necessary to be done to complete or perfect a particular job," &c., within the fair meaning of those words in the section cited. That clause cannot include work forming part of a job which in a contract for the residue of the job appears to have been intentionally excluded, to be let in future, or to be otherwise done. A contrary construction would to a great extent defeat the policy of the provision, by making its evasion by three-fourths of each board entirely easy. In any case of an extensive work, a small part might be let to the lowest bidder, according to the charter, and the residue procured to be done under the clause referred to. The clause was, doubtless, intended for cases of work omitted in a contract from inadvertence, or the necessity of which to complete a job was unforeseen when the contract was made.

Another position of the defendant is, that the work in question is covered by the terms of the contract of Fairchild, Walker & Co., and, therefore, there is no ground for granting an injunction. If the work is within that contract, an injunction against a new employment of those persons, and the carrying out of the resolution would certainly be harmless; that fact, however, is not a reason for issuing an injunction. But if the contract of Fairchild, Walker & Co. does not cover that work, the resolution for their employment to do the work was unauthorized, and the carrying out of the resolution by the defendants, or a new employment by them of Fairchild, Walker & Co. to do the work, would be illegal. After a careful examination of the contract, and much consideration of the question, I am satisfied that the contract does not, by a just and proper construction, embrace the entire work of the construction of the gate-houses, aqueduct, and their appurtenances; on the contrary, I think it apparent on the face of the contract, that this work, with the exception of such parts of it as would be performed by doing work plainly and particularly, not in general terms, specified therein, was intended to be excluded from the contract. The 4th and 13th specifications provide for excavations of areas for the foundations of the gate-houses, and making excavations for the foundations of the gate-houses, pipe-vaults, laying pipes, and the aqueduct, &c., of such depths, &c., as the engineer may direct; but, beyond that, I find no provision in terms for build

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ing the gate-houses by those contractors. The absence of such a provision is strong evidence that it was not intended to bring that work within the contract. In addition to that, the 26th specification clearly contemplates that this work will be done by other persons. The language is, "During the construction of the masonry of the gate-houses, pipe-vaults, conduit, the laying of pipes, and other necessary work, the Croton Aqueduct Board reserves the control of so much ground as the engineer may deem necessary for the proper accommodation in the construction of such works, and of the persons employed on them." General language in the specifications must be construed in connection with this clause, and so limited in interpretation as to allow the clause an effect in accordance with its obvious meaning.

It is impossible for the court, and the court ought not if it could, upon this motion, to decide precisely how far Fairchild, Walker & Co. are entitled under the contract to do work which will be in aid of the construction of the gate-houses, and other things mentioned in the 27th specification. If the construction of the gate-houses is not committed to those persons by their contract, as I have already expressed the opinion it is not, that is sufficient to call upon the court to prevent by injunction the execution of the resolution of the defendants for giving them the work, and to prevent any new employment by the defendants of those persons to construct the gate-houses, &c., except by contract founded upon a sealed bid or proposal, as provided in section 38, above referred to, of the law of 1857; the injunction not, however, to affect the rights of Fairchild, Walker & Co. to perform, or the right of the defendants to permit performance of, the present contract according to its terms.

I think the complaint sufficient as a pleading to warrant the relief demanded to that extent. As a pleading, it sufficiently shows an intention by the defendants, beyond the passing, to carry out or execute the resolution. In regard to a public injury, it shows that according to the bid of Baldwin & Jaycox for the work, there would be a saving to the Corporation of New York by letting the work pursuant to the charter, instead of having it done under the contract of Fairchild, Walker & Co., upon a single item of the work, of \$16,730.

An undertaking must, however, be executed on the part of

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the plaintiffs as a condition of granting the injunction, in such sum and with such sureties as shall be approved by the court, on one day's notice to the defendants, and be duly approved and filed.

An injunction is ordered according to this opinion, upon such an undertaking being first given within ten days.

HAMEL *a.* GRIMM.

Supreme Court, First District ; Special Term, March, 1860.

CAUSE OF ACTION.—RELIEF AGAINST JUDGMENT.—COMPLAINT.

An action to set aside a judgment on the ground of its being contrary to equity, cannot be maintained unless the party was ignorant of the fact relied on, pending the suit, or it could not have been received as a defence, or he was prevented from availing himself of the defence by fraud or accident, or by the act of the opposite party, unmingled with negligence or fraud on his part.

A complaint in such an action, resting on the fact that the judgment recovered was based on the testimony of the adverse party, that an instrument in question which was lost was a mortgage, whereas it had since been found and proved to be absolute,—is not sufficient to show a cause of action, unless it also states that upon the trial the party did not know its contents, or that he offered himself as a witness.

Demurrer to complaint.

The plaintiff in his complaint alleged the following facts: In the month of January, 1856, Hamel owed Grimm \$400, and in payment of the debt sold Grimm the fixtures and stock of a grocery store, and executed a bill of sale therefor; that immediately thereafter Hamel entered into the employment of Grimm as his clerk in attending such store; that in December, 1856, such stock of goods was taken by Lockwood, a constable, upon an execution issued upon a judgment in favor of one Eagan against Hamel, and sold; that Grimm brought an action against Lockwood and Eagan in the Marine Court of the

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city of New York, in trespass for the conversion of the goods, and recovered a judgment for the sum of \$375.04.

That on the 20th day of April, 1858, Grimm commenced an action against Hamel in the seventh judicial district court for the city of New York, to recover the original debt of \$400, which Hamel alleged he paid by the sale of his stock of groceries; that the trial of this action resulted in a judgment of \$223.75 in favor of Grimm. The complaint further alleged that this judgment was unfairly obtained by the false testimony of Grimm and another witness, to the effect that Grimm did not take a bill of sale of said goods in payment of such debt; but that the paper he received at the time referred to was a chattel mortgage only for the security of the debt; that this question of fact was the turning point in the case; that at the time of the trial in the district court, the bill of sale could not be produced as it had been lost; but having since been found, Hamel asked that the judgment of the district court be set aside and a new trial awarded, as he could get relief in no other manner. The complaint also alleged, that since the last judgment was obtained, Grimm had released Eagan from the judgment in the Marine Court, which had the effect to release Lockwood. And the plaintiff asked that Grimm be compelled to account for what he had received from Eagan, and to satisfy the judgment obtained in the district court.

George Carpenter, for the plaintiff.

E. W. Dodge, for the defendant.

INGRAHAM, J.—All the causes of action set out in the complaint are defective, except the first.

It is there alleged that the plaintiff was unable to give in evidence a bill of sale upon the trial, which was in possession of the defendant's counsel, and that upon the trial, the defendant testified that it was only a mortgage. That since the trial the bill of sale has been found, and that it is not a mortgage.

It is not alleged that upon the trial the plaintiff did not know its contents, or that he offered himself as a witness to that effect. The mere loss of the paper did not relieve him from the obligation to give all the evidence in his power.

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If he had testified, and there had been a difference between the testimony of the parties, then the discovery of the paper might be newly-discovered evidence, so as to warrant granting a new trial. But if he knew of the contents of the paper, and did not give testimony as to its contents, it is too late now to ask the court to relieve him from the judgment.

In *Larming a. Eddy* (1 *Johns. Ch.*, 49), the chancellor says: "This court will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question pending the suit, or it could not have been received as a defence."

The same principle is stated in *Foster a. Wood* (9 *Johns. Ch.*, 87), with the additional exception, or unless he was prevented from availing himself of the defence by fraud or accident, or the act of the opposite party, unmingled with negligence or fraud on his part.

The plaintiff, before he is entitled to the relief sought for, should bring himself within these cases, either by showing his ignorance of the facts in question at the trial, or excusing the non-production of parol evidence on his part, or in some other way to relieve himself from the obligation, to avail himself of all the means in his power, to succeed upon the former trial.

He may so amend his complaint; but in its present form, I do not think him entitled to the relief he asks for.

Judgment for the defendant on demurrer, with leave to plaintiff to amend on payment of costs.

MILLS *a.* VAN VOORHIS.

Court of Appeals; December, 1859.

PARTIES IN FORECLOSURE.—DOWER.—SPECIFIC PERFORMANCE.—
COMPENSATION.—PARTIAL PERFORMANCE.

In foreclosing a purchase-money mortgage, the wife of the mortgagor is a necessary party.

The provision of 1 Revised Statutes, 741, § 5—that the wife is not entitled to dower

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in lands mortgaged when purchased, for the purchase-money, as against the mortgagee, and those claiming under him,—does not affect her right to dower in the equity of redemption.

A foreclosure, though effected in the lifetime of the mortgagor, is not effectual to bar his wife's inchoate right of dower, unless she is made a party.

The wife of the grantee of an equity of redemption in lands subject to a mortgage, is a necessary party to an action against the grantee for foreclosure of the mortgage.

The omission to make such wives parties to the foreclosure, constitutes a defect in the title which discharges a purchaser from specific performance. Such a defect is not a proper subject for compensation.

The practice of decreeing performance, at the suit of the purchaser, notwithstanding defects in title, should be very cautiously adopted; and where such relief was not asked at the trial, it cannot be granted on appeal.

A new trial awarded, on the ground that the case had not been fully considered in certain important aspects.

Appeal from judgment.

The action was by a purchaser, for specific performance. The defendant was owner of real property, a portion of which he sold to one Learned, taking from him a purchase-money mortgage. Learned sold various lots to third persons. On a foreclosure, by suit, of the purchase-money mortgage, these grantees were made parties; but their wives were not. On a sale under the decree the defendant bid in the premises; and subsequently entered into the contract to convey them, to enforce which this action was brought. The plaintiff had objected to the title on the ground of defect of parties in the foreclosure.

The referee before whom the cause was tried, was of opinion that the title was sufficient, but that the plaintiff was in fault for not having accepted the deed which the defendant had tendered; and adjudged that the plaintiff was not entitled to specific performance, but only to recover back his payment and interest, and to have the contract cancelled.

From this judgment the plaintiff appealed; but it was affirmed in the Supreme Court at general term, on grounds stated in the report of the case in 23 *Barb.*, 125.

The plaintiff appealed to the Court of Appeals.

Cummins, Alexander, and Green, for the appellants.

J. K. Porter, for the respondent.

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BY THE COURT.—SELDEN, J.—It would not necessarily follow, even if all the objections originally taken by the plaintiff to the title of the defendant were unfounded, that a specific performance of the contract must be decreed. As, however, there is nothing in the case to impeach the good faith of the plaintiff, nor any thing shown on the part of the defendant which would make it inequitable to compel a performance, it would seem that a court of equity, in the exercise of a sound discretion, would be called upon, if there is no defect in the title, to require the defendant to perform. The only objection not obviated by the proof given at the hearing, was that based upon the omission to make the widow of one person and the wives of others interested in the premises as grantees of the mortgage, parties to the suit to foreclose the mortgage given by Hans Learned to the defendant. This was the only objection considered by the referee or by the Supreme Court, and the only one which it is necessary to consider here.

The case does not show very clearly, whether Learned the mortgagor had a wife, or, if he had, whether she was made a party to the suit or not.

But the mortgage having been given for purchase-money, both the referee and the Supreme Court have assumed, that the question whether it was necessary to make the wives of the grantees of the mortgagor parties in order to cut off their equitable rights, is identical with the one whether it was necessary, if the mortgagor had a wife, to make her a party for that purpose. This assumption is no doubt correct to this extent, viz.: that if the dower-rights of the wife of the mortgagor, in the equity of redemption, were such as to require that she should be made a party to the foreclosure, then for the same reason it would be necessary to make the wives of the grantees of that equity parties. The converse of the proposition, however, may not be, and I think is not, true. If it be unnecessary in such cases to make the wife of the mortgagor a party, it is because the statute concerning mortgages for purchase-money has made it so. This statute, however, does not extend to the wives of the grantees of such mortgagor, and can in no way affect their rights.

But as the conclusion to which I have arrived, as to the necessity of making the wife of the mortgagor himself a party, is

decisive of this branch of the case, I will consider the question in the aspect in which it was considered by the court below. Is it necessary, then, in foreclosing a purchase-money mortgage, to make the wife of the mortgagor a party, in order to cut off her rights in the equity of redemption?

1. Would it be necessary independent of the statute? 2. If so, does the statute render it unnecessary? Whether at common law it would be necessary to make her a party, must depend upon the question whether she has any interest, either legal or equitable, complete or inchoate, in the mortgaged premises. If she has such an interest, however remote, then, upon the plainest and most familiar principles, that interest cannot be affected unless by virtue of some statute, by a suit in equity to which she is not a party. This is not only well settled by authority, but results from the simplest and most obvious principles of justice. The doctrine has been frequently applied to the inchoate rights of dower of a married woman. It was so applied in the case of *Wilkinson a. Parish* (3 *Paige*, 653), where it was held that the purchaser of premises sold under a decree for partition, takes the same, subject to the right of dower of the wife of one of the tenants in common, unless the wife was a party to the suit.

It is entirely clear, therefore, that if the wife of one who owns real estate, subject to a mortgage given for purchase-money, has any inchoate dower-rights at all in respect to such property, these rights, unless by virtue of the statute, could not be affected by a foreclosure suit, to which she is not made a party, and a purchaser under such a foreclosure would not obtain an unincumbered title. That she has rights of this description, under the principles uniformly applied to mortgages in this country, is, I think, too clear to be denied. It having been for the last half century the settled doctrine in this State, that the mortgagor, notwithstanding the form of the instrument, is to be regarded as the real owner of the property, and the mortgagee, until he obtains possession, as having only a lien or charge upon it, the courts were bound in consistency to hold, as they have repeatedly held, that the dower-rights of widows extend to equities of redemption. This has never been doubted since the days of *Hitchcock a. Harrington* (6 *Johns.*, 290); *Collins a. Torrey* (7 *Ib.*, 278). The same doctrines prevail in some, if not

all the other States. (Fish v. Fish, 1 Comst., 559 ; Snow v. Stevens, 15 Mass. R., 279 ; Gibson v. Crehn, 3 Pick., 475.)

That a mortgagor who has purchased land, and given back a mortgage for the whole or a part of the purchase-money, is the owner of an *equity of redemption* in the premises so purchased, will not be disputed ; and there is not the slightest legal difference between this equity, so far as he is concerned, and one where the mortgage was given for borrowed money. His rights in the property are in all respects the same, and the same proceedings are necessary to foreclose them. If, therefore, he is to be regarded as the real, beneficial owner of the property in the one case, he is in the other ; and it would seem plainly to follow that if his widow is entitled to be endowed of this equity in the one case, she must be equally so in the other.

There is nothing in the case of Stow v. Siffit (15 Johns., 458) which conflicts with this conclusion, even if the doctrine of that case could be sustained.

When a married man owning unincumbered real estate executes a mortgage upon it, in which his wife does not join, as her inchoate interest in the property precedes that of the mortgagee, it seems perfectly just that her rights, if not released, should be paramount to his. But where the purchase-money has never been paid, and the mortgage is given for that, there is an apparent injustice in permitting the rights of the wife to prevail over the *prior* rights of the vendor ; and it was to avoid this result, that the late Supreme Court adopted the somewhat peculiar doctrine of the case of Stow v. Siffit. It had been said in several old English cases, that when the seizure of the husband was *instantaneous* only, as when the title was transferred to and from him at the same instant, and by the same act, there no right of dower would attach, and it was upon the doctrine of these cases that the Supreme Court rested its decision in the case of Stow v. Siffit. On looking carefully into these old cases, however, it appears that in none of them, was the conveyance intended to vest any beneficial interest in the husband ; the object being in every case merely to transfer the title to, or perfect the title in, some other person. These cases, therefore, would seem scarcely to afford any solid foundation for that of Stow v. Siffit.

But that case, assuming it to have been rightly decided, has

no bearing upon the point presented here. The question there was not, whether the widow was entitled to dower in the *equity of redemption*, subject to the lien of the mortgage, but whether her right of dower was paramount to the rights of the mortgagee, and whether she could recover her dower in opposition to the mortgage, and without offering to redeem it. There is nothing in the case of *Stow v. Sift*, or any other well-considered case, nor in reason, to show that the wife or widow of one who has given a mortgage for purchase-money, whether she has or has not joined in the mortgage, is not as much entitled to be endowed of the equity of redemption—that is, of the interest justly and beneficially vested in her husband—as the wife of any other mortgagor.

The only effect of the decision in *Stow v. Sift* was to place the wife of one who had, during coverture, given a mortgage for purchase-money in which she had not joined, substantially in the same position as if the mortgage had been given for purchase-money, or any other indebtedness before coverture, or as if she had joined in a mortgage for such indebtedness after coverture. A *feme-covert*, who executes a mortgage jointly with her husband, is nevertheless entitled to dower in the equity of redemption of which her husband is seized; notwithstanding the mortgage, and this right, as we have seen, is not affected by a foreclosure in equity, unless she is made a party. If omitted, she can come in at any time afterwards and redeem, notwithstanding a decree and sale in the foreclosure suit. It is the same under the decision in *Stow v. Sift*, in case of a purchase-money mortgage, although the wife may not have joined in such mortgage. At common law, therefore, aside from our statute on the subject, it is plain that a wife or widow, in such a case, must be made a party to a foreclosure suit, or her right to redeem the premises from the lien of the mortgage will remain unaffected.

Does the statute in question prescribe a different rule? Its language is this: "Where a husband shall purchase lands during coverture, and shall at the same time mortgage his estate in such lands to secure the payment of the purchase-money, his widow shall not be entitled to dower out of such lands as against the mortgagee, and those claiming under him, *although she shall not have united in such mortgage*; but she shall be entitled to

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her dower as against *all other persons*. (1 *Rev. Stat.*, 741, § 5.) It is manifest on the face of this provision, within the express declaration to that effect contained in the revisor's notes, that its design was simply to confirm, by positive enactment, the rule adopted in the case of *Stow v. Sift* (*supra*). The sole motive for that decision was, as we have seen, not to interfere with the widow's claim of dower in the equity of redemption, but to prevent that claim from having a *preference* over the mortgagee when given for purchase-money. The motive for the enactment was precisely the same, and the reason upon which both the decision and the statute were founded goes no further. Care seems to have been taken, in framing the statute, thus to limit its effect. The words "although she shall not have united in such a mortgage," plainly import a design to make the position of the widow as to a mortgage for purchase-money, not signed by her, the same as in respect to any other mortgage which she had signed.

But it is said that the statute goes further than this, and denies to the widow all right to dower, as against the mortgagee, and any person claiming under him. Hence, as every person deriving title under the foreclosure may be said to claim under the mortgagee, it is insisted that all claim to dower on the part of the widow, not only in the land at large, but in the equity of redemption, is cut off by such foreclosure, whether she is made a party or not.

The objection to this construction is, that it is inconsistent with the reason upon which the statute was founded, as gathered from the history of the law on the subject, as well as from the express declaration of the revisors; and inconsistent also with the object and intent of the statute, as plainly evinced by its phraseology in other respects. Parties obtaining title under the foreclosure, *claim*, not only under the *mortgagee*, but under the mortgagor also. They obtain the rights of *both*. So far as they claim under the mortgagee alone, they are protected by the statute against the widow without her having been made a party. In that portion of the estate she has no interest; but in respect to the portion which, under the foreclosure, is obtained from the mortgagor, viz., the equity of redemption in which she has an interest, her rights are not affected unless made a party.

This construction makes the whole law on the subject reasonable and consistent, while any other would produce manifest incongruity and injustice. These views accord with, and are sustained by, those expressed by the vice-chancellor and chancellor in the case of *Ball a. The Mayor, &c., of New York* (10 *Paige*, 56), so far as that case involved the question presented here. In that case, the foreclosure was not completed until after the death of the mortgagor, and hence it did not become necessary to determine the effect of a foreclosure in his lifetime. There is not the slightest reason, however, for giving to such a foreclosure any greater effect in cutting off the dower-rights of the wife of the mortgagor, than to one which takes place after his death. The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow. Neither can be impaired by any judicial proceeding to which she is not made a party.

If this reasoning is sound, it follows that it was absolutely necessary to make the wives of the grantees of Learned parties to the foreclosure suit, in order to cut off their inchoate rights of dower.

The wives of the *grantees* of a mortgagor have the same rights of dower in the equity of redemption, as the wife of the mortgagor himself. The cases of *Collins a. Torrey* (7 *Johns.*, 278), and *Snow a. Stevens* (15 *Mass.*, 279), were both cases of this description. The plaintiff in each was the widow, not of the mortgagor himself, but of a grantee of such mortgagor; and, in each, she was held entitled to dower in the equity of redemption. These are leading cases in the respective States, and have been repeatedly sanctioned and approved by the courts of both.

The necessity of making the wives of the grantees of Learned parties, therefore, in order to foreclose their rights, is clear.

The defendant, therefore, has not a perfect title, nor would a foreclosure of the Learned mortgage necessarily give him such a title, as the grantees' wives not made parties to the first foreclosure, would have a right to come in and redeem. The plaintiff cannot, therefore, have a judgment or decree for a *complete* performance.

But he insists, that if he has not made a case for full and complete performance, he is nevertheless entitled to a judg-

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ment that the defendant convey such title as he has, with *compensation* for the defects, and he asks for such a judgment.

It is quite clear that this is not a case for compensation. It would, obviously, be entirely impracticable to arrive at any reasonably accurate estimate of the defects in the defendant's title, or to ascertain what sum would be an adequate compensation for them—depending as they do upon the deaths of a number of individuals, upon the survivorship of their respective wives, upon the time when, if ever, their rights of dower shall accrue, and many other contingencies too uncertain to be capable of even a proximate estimation. Again, the contract requires the defendant to give a deed with covenants; and it would be necessary to modify these covenants, so as to exempt the defendant from liability for any failure of title growing out of the defects compensated for, which would still further complicate the case. For these, and other similar reasons which might be suggested, no judgment for compensation could with propriety have been given by the court below, even if the plaintiff had asked for such a judgment upon the trial, and had furnished the court, so far as practicable, with the necessary facts upon which to predicate it.

The plaintiff, however, further asks, if the opinion of the court should be against him upon the two points already considered, that the defendant be required to convey that portion of the premises to which he has a perfect title, and offers to accept of such a conveyance.

The Court of Chancery in England has frequently exercised the power here sought to be invoked, and our courts have in some instances followed their example. But it is obvious that in this country, where the value of real estate is so fluctuating, changing not unfrequently from day to day, the practice of making such decrees, if generally adopted, would give to the purchasers of such property great advantages over the vendors. By availing themselves, as in this case, of some defect in the title to a portion of the premises, they might keep the matter in abeyance, perhaps, for years, secure against loss, in case of a fall, but ready to avail themselves of any rise in the value of the property. Although, therefore, the power of making such decrees no doubt exists, it should in this country, at least, be exercised with great deliberation and caution.

In the present case, however, I feel bound to say, that I see nothing in the facts developed, which throws the least suspicion upon the fairness and good faith of the plaintiff, and I should feel strongly disposed to grant him the relief sought in this last request, if it could be properly given in the present position of the case.

It is of no consequence that no such offer is made or relief asked in the complaint. But the difficulty is, that no such ground was taken or suggestion taken at the trial. Very many circumstances might exist, which would make it highly inequitable to make such a decree. The relative value of the different portions of the property may have entirely changed; the delay may have wrought inevitable changes in the relation of the whole or of parts of the premises, to the defendant's other property; valuable improvements may have been made under circumstances which would justify them. The defendant was clearly entitled to an opportunity to prove any circumstances of this nature which might have existed, and as no such decree could be made, unless asked for by the plaintiff, the defendant was not called upon to offer the proof, unless such a request was made. It is plain that no such decree can be made, without giving to the defendant an opportunity to adduce proof on this subject. What the plaintiff asks, therefore, is, in substance, that the judgment be reversed to enable him to make this additional offer and claim, notwithstanding no error was committed by the referee in disposing of the case, as it was presented before him.

These views, in which Judges Allen and Gray concur, would lead to an affirmance of the judgment. But one of my associates, Judge Strong, is of the opinion that it was unnecessary to make the wives, either of Learned himself or of his grantees, parties to the foreclosure, and is in favor of reversing the judgment for that reason. The other four, viz., Johnson, Ch. J., and Comstock, Denio, and Grover, JJ.—while they concur in holding that the wife of Learned, if he had a wife, and the wives of his grantees should have been made parties in order to cut off their rights in the equity of redemption, and that the title of the defendant is defective in consequence of the omission to make them so—nevertheless think, inasmuch as the referee decided that the defendant had a perfect title, and that the plaintiff was

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in fault for not having accepted the deed when tendered, that the case had never been fully considered in its other aspects; and that there ought to be a new trial to give the parties an opportunity to present the facts and equitable considerations bearing upon the plaintiff's claim to partial relief, and to have the same deliberately passed upon by the Supreme Court.

The judgment, therefore, must be reversed, and there must be a new trial, with costs to abide.

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Supreme Court, Sixth District; General Term, January, 1860.

AMENDMENT OF PLEADINGS AFTER TRIAL.

Where leave is given, after trial before a referee, to amend the summons and complaint, by adding a new and distinct cause of action not connected with those set forth in the original complaint, the order should only be granted upon condition that the plaintiff stipulate to set aside the report, and vacate the order of reference, with costs to abide event; and the order should provide for service of the amended summons and complaint, and for time for defendant to answer.

Appeal from an order authorizing the plaintiff to amend the summons and complaint.

This action was tried before a referee. After the referee had made his report, entitling the plaintiff to a judgment,—1st, for the two causes of action set out in his complaint; and, 2d, for a cause of action for \$66.82, not mentioned in the complaint,—the plaintiff obtained an order at the Broome Special Term, in April, 1859, in the following form:

“Ordered, that the plaintiff have leave to amend the summons and complaint in this cause, by inserting in the summons a further demand for judgment for \$66.82, and by adding another count to the complaint, alleging that the defendant is further indebted to the plaintiff for money in the defendant's

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hands belonging to the plaintiff, which the defendant received as referee in a suit of partition, in which Thompson Haynes was plaintiff, and Charles Myers and others were defendants. This motion is granted on payment of ten dollars costs by plaintiff to defendant. And it is further ordered, that this order shall not in any way, shape, or manner, affect the rights of the defendant on appeal in this cause, nor in any proceeding to set aside, reverse, or dismiss said judgment."

The plaintiff amended his summons and complaint in pursuance of this order, and the eleventh day after the order was granted he entered judgment, on the referee's report, against the defendant, for all the causes of action mentioned in the amended complaint, amounting in the whole to \$132.35, besides costs. The defendant appealed from the order, as well as the judgment, to the general term of the court. The judgment was reversed, and the order of referee vacated, costs to abide the event of the action. The following opinion was delivered on the appeal from the order authorizing the plaintiff to amend the summons and complaint.

James R. Allaben, plaintiff, in person.

William Wakeman, defendant, in person.

BY THE COURT.*—BALCOM, J.—The order authorizing the plaintiff to amend the summons and complaint, as used, deprived the defendant of the right to answer a cause of action, for which judgment has been entered against him for \$66.82. It affects a substantial right, and is, therefore, repealable. The amendments brought a new and distinct cause of action into the complaint, which was in no way connected with either cause of action set out in the original complaint. The order should not have been granted, except upon the condition that the plaintiff stipulated to set aside the report of the referee, and vacate the order of reference, with costs to abide the event of the action; and then it should have provided for the service of a copy of the amended summons and complaint on the defendant, and given him twenty days after such service to demur to

* Present, MASON, BALCOM, and CAMPBELL, JJ.

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or answer the amended complaint. If all the facts in the case had been presented to me on the motion for the order, as they appeared before the referee, I should not have granted the order. To say the least that the case justifies, the order was improvidently granted. It should be modified in conformity with the foregoing views. And as the plaintiff obtains a favor under it, and the defendant must be put to the trouble of answering the amended complaint, the plaintiff must pay \$10 costs of the appeal from the order. I speak on the question of costs in the same manner in which I would if the order appealed from had been made at a special term, held by another judge. The plaintiff took the risk when he obtained the order, of a change of my opinion on the appeal, as well as of adverse views of my brethren.

The order must be modified in conformity with the foregoing opinion, and the plaintiff must pay the defendant \$10 costs of the appeal from the order.

Decision accordingly.

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New York Superior Court; Special Term, March, 1860.

PARLIAMENTARY LAW.—ARREST.—ESCAPE.

The House of Representatives has a power to institute inquiries and to order the attendance of witnesses; and, in case of disobedience, to bring them in custody to the bar, for the purpose of examination.

If there be a charge of contempt and breach of privilege of the House, and an order for the person charged to attend and answer it, and a wilful disobedience of that order, the House has power to cause the person charged to be taken into custody, and brought to the bar to answer the charge.

Where the House has jurisdiction of the subject-matter, its determination as to the exercise of these powers cannot be questioned collaterally.

Where by the statement of facts agreed on by the parties, it is alleged that the House, in due form of law, required and caused to issue in due and proper form of law, a warrant for the arrest, the court will not regard the objection that it

*affirmed,
17 Aug. 319;
21 Nov. 40.*

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is not stated that an order for the appearance of the party was first issued and disobeyed.

The arrest by the sergeant-at-arms, under a warrant from the House of Representatives, of a prisoner in custody of a sheriff, and the removal of him out of prison by virtue of such arrest, is a removal "by virtue of some writ of *habeas corpus* or rule of court, or in such other cases as may be prescribed by law," within 2 Revised Statutes, 487, as modified by chapter 390, section 2, of the Laws of 1847—providing that being out of prison in such cases is not an escape.

Trial by the court.

This was an action brought by the plaintiff against the sheriff for the escape of John D. Williamson, who had been arrested upon execution against his person, and was confined within the liberties of the jail, having given the usual bond to such sheriff.

The action was tried before Mr. Justice Hoffman, a jury being waived, pursuant to the Code.

The following state of facts was admitted for the purposes of the trial :

I. That on the 18th day of February, 1857, the plaintiff in this action recovered a judgment in the Superior Court of the city of New York, against one John D. Williamson, for the sum of \$1415.97, in an action in which the said John D. Williamson was liable to arrest, and in which he was arrested under sections 179, 181, of the Code of Procedure. That a transcript of such judgment was duly filed with the clerk of the city and county of New York, and an execution against the property of said Williamson was duly issued thereupon, to the sheriff of the city and county of New York, which was duly and properly returned, unsatisfied, on the 21st of April, 1857.

II. That thereafter, and on the 18th day of July, 1857, an execution in due form against the person of the said John D. Williamson was duly issued to the defendant, James C. Willett, sheriff, as aforesaid. That pursuant thereto, the defendant arrested the said Williamson, and held and confined him within the jail liberties of the city and county of New York, the said Williamson having given the bond entitling him to such jail-liberties, pursuant to the statute in such case made and provided.

III. That the Congress of the United States commenced its

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session on the 1st Monday of December, 1857, at the seat of the Federal Government, in the city of Washington, in the District of Columbia, and continued in session until after the 4th of March, 1858.

That during such session, and on or about the 15th day of January, 1858, the House of Representatives did, in due form of law, issue its subpoena, directed to the said Williamson, and requiring him to appear and give evidence before the said House, or a committee thereof, in a matter then pending and under investigation by said House, and within its jurisdiction.

IV. That the said Williamson was then confined within said jail-liberties, as aforesaid, and did not appear in obedience to such subpoena and summons. That thereupon, and on the 1st day of February, 1858, the said House of Representatives, in due form of law, resolved, and determined, and adjudged the said Williamson guilty of contempt of the dignity and authority of the said House, in not appearing as he had been required as aforesaid, and thereupon, in due form of law, required and caused to issue in due and proper form, to its sergeant-at-arms, the person designated by law to execute the same, a warrant for the arrest of the said Williamson, and to forthwith bring him, and to have his body wherever found, before the said House, at the bar thereof, to answer the said charge, and to be dealt with according to the constitution and laws of the United States.

V. That thereupon, and in pursuance thereof, such warrant was duly and properly issued to said sergeant-at-arms, and the said sergeant-at-arms, in obedience to the requirements of the said warrant, and for the execution thereof, forthwith came to the city of New York, aforesaid, and at one o'clock in the afternoon on the 2d day of February, 1858, within the said jail-liberties, arrested said Williamson, and took him, and compelled him to go under the said warrant to the said city of Washington, and had and produced his body before the said House of Representatives, at the bar thereof.

VI. That this action was commenced on the 5th day of February, 1858, and while the said Williamson was held and detained in the custody of the said sergeant-at-arms, under said warrant, at the city of Washington, aforesaid, and without the liberties of the said jail.

VII. That as soon as the said Williamson was released from the custody of said sergeant-at-arms, and on the 9th day of February, 1858, he returned to the liberties of the said jail.

VIII. That the said Williamson was so out of such jail-liberties as aforesaid, without the assent and against the will of the plaintiff in this action. That the plaintiff has paid to the defendant, sheriff as aforesaid, the sum of twenty dollars, as poundage, upon said last-mentioned execution.

IX. The defendant in this case claims that he is, in addition to the aforesaid matters, entitled to prove the insolvency of Williamson, as set up in his answer. The plaintiff denies that any evidence of insolvency is admissible for any purpose; but if the court shall deem the evidence competent and proper, the plaintiff admits that Williamson, at the time of his arrest under the warrant, was, and ever since has been, insolvent, and wholly irresponsible, and without means to pay any part of the said judgment upon which said execution was issued.

X. Also, under a similar claim and objection, the fact is admitted, that Williamson objected to accompany the officer who held the warrant, because of his being held under the bond aforesaid.

E. L. Godkin, for the plaintiff.

A. J. Vanderpoel, for the defendant.

HOFFMAN, J.—The question is, whether the forcible arrest of Williamson, defendant in the action of the present plaintiff, by the sergeant-at-arms, and compelling him to go to the city of Washington, under the warrant of the Speaker, forms a defence to the sheriff, defendant in this action for an escape? Williamson had been subpœnaed to give evidence before the House of Representatives, or a committee thereof, in a matter then under investigation, and within its jurisdiction. He did not appear in obedience to that summons. He was, in due form of law, adjudged guilty of contempt, and thereupon the House, in due form of law, caused a warrant to be issued to the sergeant-at-arms, the proper officer to execute the same, for his arrest, and to have his body before the House, at the bar thereof.

It is insisted that neither branch of the Congress of the United

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States has the power of compelling the attendance of witnesses, at least from beyond the District of Columbia; that it can do no more than request their appearance, and its summons is but a solicitation; that as no power of compelling an appearance exists, no right to inflict punishment for disobedience can be supported.

If this is true, the defence to the present action is untenable. The process was utterly void. The sheriff was entitled or bound to resist it. The defendant in the action, the witness summoned, could have met force by force. It was as illegal an act, on the part of the sergeant-at-arms, as the violence of the mob in Lord Gordon's riots; and an escape in the legal sense would be made out.

I shall examine this proposition, *first*, upon the general doctrines of analogous law; and *next* (if then found necessary), upon the peculiar law which constitutes and regulates the Congress of the United States.

No view of the subject can be comprehensive or satisfactory, which does not include a notice of the law of the Parliament of England, and the influence of that law in our Colonial polity.

That the Parliament was, in its origin, a court of justice, is a fact warranted by history; and this principle pervades and expands the exercise of its authority to this day. The Saxon Council, from which it sprung, embodied in itself the supreme judicial as well as legislative power of the Saxon government. (*Edmund Burke's Abrid. of Eng. History*, 460, vol. v., Am. ed. of 1813; *Palgrave's Eng. Commonwealth*, vol. ii., 314, 634, 635; *Turner's History of England during the Middle Ages*, vol. i., 416.)

In *Atwyll's Case* (17 ed., 4) the petition of the Commons speaks of his Majesty's lieges, "called by your Highness's authority to this your *High Court of Parliament* for the shires, &c., of this your realm."

Lord Coke declares that the *High Court of Parliament* has its own peculiar law, called the *Lex et consuetudo Parliamenti*. (4 *Inst.*, 15.) This is repeated by Sir William Blackstone, and Sir Matthew Hale. (*Comm.* i., 160, 163; *On Parliaments*, 49.)

In *Howard v. Gossett* (10 *Adol. & Ell. N. S.*, 411), the phrase "either branch of the High Court of Parliament," is

used in reference to a warrant of the House of Commons; and in Reilly *a. Carson* (4 *Moore's Priv. Council R.*, 89), it is said, "The *Lex et consuetudo Parliamenti* forms part of the common law of the land; according to which the High Court of Parliament before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one."

The elements and principles of a parliamentary law were brought into the colonies, and became attributes of the power and constitution of assemblies, wherever they were formed upon the model of Parliament. In Virginia, in 1718, the Assembly concluded itself entitled to all the rights and privileges of an "English Parliament," and the records of the House of Commons were searched for precedents. (*Bancroft's Hist.*, vol. iii., 27.) In New York, besides the authority of the historian Smith, a lawyer of eminence (vol. i., 239), the journals of the Assembly abound with instances of the assertion of the general parliamentary rights and privileges, and especially of punishing contempts of its dignity or authority.

At the commencement of every session a committee of privileges and elections was appointed, and authorized to send for persons, papers, and records. (See the *Journals passim.*) Special committees were armed with the same power. (*Journal*, vol. ii., 120, 225, 228.)

On the 14th of April, 1691, the sergeant-at-arms was ordered to take a sheriff into custody for arresting an elected member upon civil process. The warrant is set forth. (Vol. i., 4.) George Webb was taken into custody for insulting, and R. Richards for assaulting a member. (*Ib.*, 406, 419.)

In November, 1753, Hugh Gain was ordered to attend the House on account of a prohibited publication, and was brought up and reprimanded. In October, 1756, Parker and Weyman were taken into custody by the sergeant-at-arms, for publishing a paper reflecting on the House. Watkins being discovered to be its author, was arrested by the sergeant. It was resolved that he was guilty of a high misdemeanor, and he was committed to the custody of the sergeant. He apologized, and was discharged on payment of fees.

A similar course was pursued with Samuel Townsend. (Vol. ii., 554.)

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In the Documentary History of New York (vol. iii., 534, 537), we find the case of McDougall, in 1770, 1771. He published a libel upon the House; was adjudged guilty of a misdemeanor; was arrested and brought to the bar. His defence was voted a contempt, and he was sent to jail. A writ of *habeas corpus* was sued out of the Supreme Court, and the return was, a commitment by virtue of a warrant of the Speaker for a contempt of the authority of the House. This was in December, 1770, and he remained imprisoned until March 4, 1771, when the Assembly was prorogued.

There can be no doubt that he was remanded on the *habeas corpus*.

It is true that in Reilly *v.* Carson (4 *Moore's Pr. C. Ca.*, 89), it was held, that a legislative assembly, created by a commission from the crown, which did not confer the power to commit for a contempt, could not do so, except for offences committed in its presence. Such a power was not a necessary attribute of the legislative capacity thus constituted; and the language used in Beaumont *v.* Barrett (1 *Ib.*, 80), and by Lord Ellenborough in Burdett *v.* Abbott (14 *East. R.*, 151), was admitted to be erroneous.

Whatever may be the rule, when an assembly acts upon a commission from the crown, recognized as the only source of its creation and its power, it is certain that the assemblies of the colonies placed their authority and its extent on a very different footing. That the people had a right to be represented in an assembly, and did not enjoy this right through the grace of the crown merely, was a fundamental doctrine. The remarkable Charter of Liberty, granted to the inhabitants of New York in 1683 (2 *Rev. Stat.*, 1813), embodied this principle. It was repeated in the important act in 1691, declaring the rights and privileges of their majesty's subjects within the province of New York. It is found in the address of the Assembly of 1704; in the resolves of 1711, declaring the inherent right of the people to dispose of the money of the freemen of the colony, which does not proceed from any commission, but from the free choice and election of the people (*Smith's History of New York*, vol. i., 132); and is constantly asserted throughout the struggles between the governors and assembly in our colonial days. "The usage, custom, and practice of the realm of Eng-

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land," "the laws of England," are perpetually recognized as the rules of the assembly and the law of the colony. Thus asserting, in matters of legislation, powers coequal in most particulars with those of an English Parliament, the assembly claimed a right to the possession of the authority vested in that Parliament, for carrying out the great objects of legislation. It adopted and acted upon the doctrine "that the law of Parliament was parcel of the law of England," was part of the inheritance of Englishmen, brought with them to the colonies, and as fully in force as the common law which accompanied their migration. (See also *Pownall's History of the Colonies*, 10; *Clark's Colonial Laws*, 435; *Edward's History of the West Indies*, vol. ii., 344.)

The powers thus asserted and exercised by these colonial bodies, fell, by a natural descent, upon the various legislatures of the States which succeeded them; and the argument which this review presents to my mind is of unanswerable force. There is a presumption of the existence, in the separate legislatures, of this inherited authority and right, and express constitutional restrictions must be found to avoid or impair it.

By the constitution of the State of New York, of April, 1777 (Art. ix.), it was declared that, "the Assembly shall enjoy the same privileges, and proceed in doing business in like manner, as the assemblies of the colony of New York of right formerly did."

The constitution of 1821 (Art. i. and iii.), omitted this clause—providing merely that each House shall determine the rule of its own proceedings. The revisors of 1830 say: "It is believed that the omission of these words, in the amended constitution, was not intended to deprive, and could not have the effect of depriving, the two Houses of the Legislature of the indispensable power of punishing for a contempt." (*Notes, Appendix 3*, vol. ii., 2d ed.) They submitted an act, which still remains in force, defining the powers of the Legislature, and specifying the privileges, the breach of which may be punished by imprisonment. The refusal to attend and be examined is one of the cases enumerated. (1 *Rev. Stat.*, 1830, 154, § 13.) Another statute regulated the mode of taking testimony. (*Ib.*, 158.)

The constitution of 1846 is the same in the particular referred to as that of 1821.

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In 1824 (of course under the constitution of 1821), William Caldwell refused to give evidence before a committee of the Assembly, upon the investigations relating to the alleged Chemical Bank frauds. Ambrose Spencer was his counsel. He was committed to the Albany county jail; a committee of the Senate requiring his evidence while thus imprisoned, on request of the Senate, the House allowed his attendance.

The House, after he had been brought before it and been heard, "*Resolved*, That there was no sufficient ground for his refusal to appear before the committee, and testify; that he was guilty of a misdemeanor and contempt of the House; that the sergeant-at-arms deliver him to the keeper of the jail of the county of Albany; that he be imprisoned until the further order of the House, and that the Speaker issue his warrant accordingly." (*Journal Ass.*, Nov. 17, 1824.)

In 1837, this subject was examined before the House of Assembly in the case of Slamm and Jaques. The following is an abstract of the report of the committee of the 10th of May, 1837. (*Document 327 of Assembly.*)

It recites a subpoena issued to Slamm and Jaques, to appear and testify before a committee. Upon proof of service and a refusal, an attachment was issued by order of the House, and they were brought up by the sergeant-at-arms. After a vote of the House they were reprimanded by the Speaker. They then appeared before the committee, and refused to be sworn, on the ground of the want of a constitutional authority to compel them to appear and testify. By order of the House, the sergeant-at-arms arrested them. The committee cite *Burdett v. Abbott* (14 *E. R.*), and *Anderson v. Dunn* (6 *Wheat.*, 204). They say: "The power of judging of qualifications, presupposes the right to issue subpoenas, which would be nugatory if no power exists to enforce obedience. The same reasoning applies in all cases where the nature of the duty to be performed by the House requires the attendance of witnesses. This power is clearly authorized by the constitution of the State and the United States, is in conformity with the law of the land, and the well-settled usages of legislative bodies in all enlightened nations."

I may add here the able opinion of Mr. Justice Daly in *Briggs v. Mackellar* (2 *Abbotts' Pr. R.*, 30), recognizing the power as part of the law of our legislative bodies.

Has the constitution of the United States, or any other law, placed either branch of the Congress of the United States in a different position as a legislative assembly, and forbidden it the exercise of this ordinary power? It might be sufficient to refer to the case of *Anderson v. Dunn* (6 *Wheat.*, 204), as covering the question. A decision that the authority can be exerted upon a person not a member, to take him into custody, and restrain his liberty for contemptuous conduct, is a stronger position than is necessary to sustain the privilege in this instance.

In my opinion, the legality of the proceeding in question here may be rested upon principles which cannot be shaken. The government of the United States is supreme within its sphere of action. It is the government of the people, and emanated from them. Its powers were delegated by all, it acts for all, and it represents all. What is thus true of the aggregate, is true of each component part of that government in its appropriate sphere. What is necessary to enable either branch to fulfil its functions and discharge its duties, is impliedly vested in that branch by the will of the people. "What is necessary does not import an absolute physical necessity, so that one thing cannot exist without the other. It stands for any means calculated to attain the end, appropriate and plainly adapted to it, and not prohibited."

Now, the power of investigation through a committee is essential to wise legislation. The power to call for information from others, flows from this necessity. Hence the old formula of authority to send for persons and papers. But to rob the process of such a committee of all compulsory effect, to reduce it to a request, to deny all means of enforcement and all power to punish for disobedience, would be to render inquiry often fruitless, to exclude sources of information, and to impair or defeat the objects of legislation.

In my judgment, neither branch of Congress has the right to disclaim the power I deem it to possess, and which in this instance the House of Representatives has exercised. It is a power clothed with a trust, and vested for the fulfilment of a trust. It is identical with, or manifestly important to the discharge of, that trust. It cannot be renounced without impairing the means of duly executing the office committed to the body, and, therefore, may not be relinquished without a breach of duty.

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The possession of the authority in question is vindicated by the ablest of our jurists and commentators. Chancellor Kent treats it as undeniable. (*Com.*, vol. i., 236.) Justice Story reasons upon it with his usual fulness and force, and cites examples of its exercise. (*Com.*, vol. ii., 305, 317. See, also, *Rawle on the Constitution*, ch. 4, p. 48.)

I refer also to the act of Congress of May 3, 1798, by which authority is conferred upon the president of the Senate, and other officers, to administer oaths to witnesses in cases of examinations before committees or otherwise.

Since the argument of this cause, the Senate of the United States has, in the case of Thaddens Hyatt, claimed and insisted upon the right in question. He had been summoned to attend as a witness before a committee of the Senate. Upon his refusal to attend, the committee reported, and a warrant was, by order, issued, signed by the vice-president, directing the sergeant-at-arms to arrest him. Under this, he was brought before the Senate, and his defence, consisting of an argument against the jurisdiction of that body, was read. He was remanded to the custody of the sergeant-at-arms, time being taken for consideration. On a subsequent day (March 12, 1860), the subject was discussed at length, and a resolution that he be committed until he should appear and submit to an examination was adopted by a vote of 40 to 10.

But the occasional dissimilarity of our legislative bodies from the Parliament of England, and especially the prevalence of written constitutions, has modified and affected the parliamentary law in various particulars and to a considerable extent, and in none more so than in the theory which regards the Parliament as a court of justice.

One of the most prominent and important of the principles of our government is to keep, by written definitions and boundaries, the great departments distinct. No greater improvement has, perhaps, been made in government than to separate the judiciary from the executive and legislative branches. It is the glory of the British constitution to have led in the establishment of this most important principle. "The next equally grand and equally clear doctrine of our polity is, that the ultimate power of interpreting and applying laws, of judging of their validity, of enforcing their provisions, and arresting or punish-

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ing their violation, is vested in the judiciary. It is the theory and plan of the constitution to restrain the Legislature as well as other departments, and to subject their acts to judicial decision, wherever it appears that such acts infringe constitutional limits." (*Daniel Webster; The Federalist*, No. 78; and *United States v. Dickson*, 15 *Pet.*, 141.)

It would be inaccurate, and convey a false notion of our legislative assemblies, to speak of them as courts of justice. It is accurate and legal to say, that they exercise some of the functions, employ some of the agencies, and are endued with some of the powers of courts of justice. In what cases and to what extent such powers may be legally exercised, is a point probably incapable of being logically defined, and which it would be presumptuous to attempt to define. One great principle, which pervades and illumines our whole system, will serve as a guide and a limit. Those powers are vested, by the principles of the common law itself, which are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute.

It follows, from these views, that all the asserted powers of Parliament to interdict the prosecution of actions for the invasion of personal liberty—all the claim to punish for disobedience to such an interdict, are repugnant to our constitutional system and illegal. The House of Commons has declared judgments in the King's Courts, upon a question of privilege, unlawful. It has committed judges for giving judgment in such an action, and parties and their attorneys to Newgate for commencing them. (See *May on the Law and Practice of Parliament*, ch. 6, 143.)

All this is unwarranted and illegal. In short, the rule for our guidance cannot be better expressed than in the language of Justice Patterson, in *Stockdale v. Hansard* (9 *Adol. & Ellis*, 1), and of Justice Coleridge, in *Howard v. Gossett* (10 *Adol. & Ellis*, *N. S.*, 386.) "If the orders of the House of Commons be illegal, and not merely erroneous, upon no principle known to the laws of this country can those who carry them into effect justify under them. The mere circumstance that the act complained of was done under the authority and order of the House of Commons cannot of itself excuse the act, if it be in its nature illegal; and it is necessary, in answer to an action for such ille-

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gal act, to show, not only the authority under which it was done, but the power and right of the House of Commons to give such authority."

It is enough to say that the law is supreme over the House of Commons, as over the crown itself. If the limits of the law be passed by either, they are, indeed, for the most satisfactory reasons, themselves irresponsible; but the law will require a strict account of the iracts in the persons of their agents; and these, according to the nature of the illegality, will be answerable civilly or criminally.

The right of courts of justice to pass upon the proceedings of either House in these matters upon a *habeas corpus*, or in an action properly raising the question, is therefore indisputable. The proposition of counsel in *Stockdale v. Hansard* that the officer, being an officer of the House of Commons, is protected by the order of the House directing him to do the identical act complained of, and that such order is, of itself, and without more, an answer to the action, is not the law of our country; and this proposition the Court of Queen's Bench deliberately and unanimously denied (10 *Adol. & Ellis*, 405); and the Court of Exchequer Chamber did not pass upon it, finding it unnecessary.

I feel myself, therefore, warranted and bound to examine and determine every point which may be urged against the legality and form of this proceeding.

And, *first*. I hold, in the language of the Court of Exchequer Chamber, in *Gossett v. Howard* (10 *Adol. & Ellis, N. S.*, 411), "that the House has a power to institute inquiries, and to order the attendance of witnesses; and in case of disobedience, bring them in custody to the bar, for the purpose of examination. That if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody, and to be brought to the bar to answer the charge; and further, that such House, and that alone, is the proper judge when those powers, or either of them, are to be exercised."

I accede to the last clause of this proposition, when (as in the case stated in the first clause of a requisition for the attendance of witnesses) the fact of the jurisdiction of the subject-matter

is undeniable. When the question is settled in the mind of the judge, that the action in question was with the authority of law to exercise a portion of judicial power, and expresses a judicial determination on the matter and as to the party, then the decision cannot be questioned. Its correctness is not open for revision in any way but by a review, when one is allowed. It is binding as the judgment of a competent tribunal, until so reversed. (*Wilcox a. Jackson*, 13 *Pet.*, 511 ; *The State of Rhode Island a. The State of Massachusetts*, 12 *Id.*, 718 ; *The People a. Sturtevant*, 5 *Seld.*, 266.)

Next. That if, by a regular practice, an order of the House should be made to precede and direct the issuing of a warrant, then the fourth article of the statement of facts, that the House in due form of law required and caused the issue of the warrant, removes the objection.

Next. That the warrant may justly be considered as having expressed on its face the cause of the arrest, viz., the failure to appear as had been required ; but if this were otherwise, the rule is placed beyond all question, that an adjudication of a contempt having been committed, is sufficient. (*Burdett a. Abbott*, 5 *Dow P. Ca.*, 199 ; *Gosset a. Howard*, *ut supra* ; *Anderson a. Dunn*, 6 *Wheat.*, 204.) It is presumed, with respect to such writs as are actually issued by superior courts, that they are duly issued, and in a case in which they have jurisdiction, unless the contrary appears on the face of them.

Again. The course of practice which has been pursued, if erroneous, can only be treated as an irregularity, and cannot affect the material questions in the case. It seems, from the statements of the practice in the Treatises of Messrs. May & Cushing, that the course in England is, where the witness is in the custody of a keeper of a public prison, to order the keeper to bring him up. Such order is followed by the Speaker's warrant, served by a messenger upon the keeper. (*May's Law and Pr. of Parliament*, 306, 307 ; *Cushing's Law and Pr. of Leg. Ass.*, 948.)

The ordinary course of a court of justice to obtain the attendance of an imprisoned witness, is by a *habeas corpus*, and *testificandum*. (*Greenleaf's Ev.*, vol. i., 312 ; 2 *Rev. Stat.*, N. Y., 559.)

By the Judiciary act of 1789, the courts of the United States

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can issue such a writ for prisoners in jail for the purpose of testifying. (Ex-parte Dorr, 3 *How. U. S. R.*, 103.)

That some questions may arise of embarrassment respecting the mode of proceeding, is probable, but the present case is, I think, free from them. The defendant in the action was taken by the regular officer of the House, and returned to the liberties as soon as released. It may be either assumed that this was with the consent of the sheriff, and there was a continued constructive possession of the person in him, if he could be deemed the officer to execute the process, or that his surrender of the person to the sergeant was warranted, because the latter was the proper officer.

It remains to be considered, whether the particular law of escape creates such an exception to the exercise of the power in question as leaves the sheriff liable. If there is a power in the House to call for the attendance of witnesses out of the county, the interruption of the imprisonment, if there is any, is no greater than when the party is taken upon the subpoena from a court out of the county. (18 *Johns.*, 48.)

A striking precedent is to be found in the valuable work of Mr. Cushing (p. 760, citing Hansard (1) xxxiii., 883). A select committee, appointed to investigate complaints respecting the prison of Lincoln castle, with power to send for persons, papers, and records, having found it necessary to examine witnesses on the spot, and doubting whether their warrant to the sheriff to bring up the bodies of those under his charge would protect him against actions of escape, made a special report to the House for its advice. The House, entertaining no doubt, recommitted the report.

The statute of our State "of Escapes and the Liabilities of Sheriffs therefor" (2 *Rev. Stat.*, 437), as modified by the act of 1847 (ch. 390, § 2), contains the exceptions, "When the prisoner is at large out of prison by virtue of some writ of *habeas corpus* or rule of court, or in such other cases as may be provided by law." If the views I have taken are correct, the being out of the prison was upon process equivalent to a *habeas corpus*, or in a case provided for by law.

The judgment must be for the defendant.

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New York Superior Court; Special Term, March, 1860.

MECHANICS' LIEN.—OWNER.

G., being owner in fee of four lots in the city of New York, agreed with F., by a contract in writing under seal, to sell such lots to him, and to make a building loan thereon, upon condition that if there were any failure on the part of F. to fulfil his part of the agreement, the interest of F., his heirs, and assigns in the premises should cease. The agreement provided that F. should build six houses on the lots, and that if there should be any mechanics' lien on the premises, G. might apply the advances to the payment thereof; and when the buildings were completed, G. was to convey to F. on payment of a sum specified.

Held, that neither F. nor one claiming under him by virtue of a second contract had, without fully performing the contract, any interest which is the subject of a mechanics' lien.

Trial by the court without a jury.

The facts are fully stated in the opinion.

L. J. Goodale, for the plaintiff.

E. P. Clark, for the defendant.

BOSWORTH, Ch. J.—The plaintiff brings this action to recover possession of a lot of land on the south side of Fortieth-street, between the Eighth and Ninth Avenues, in the city of New York, sixteen feet and eight inches wide, and one hundred feet deep, together with the dwelling-house standing thereon.

On and prior to the 6th day of September, 1855, Charles E. Grant owned in fee a parcel of land on the south side of Fortieth-street, commencing two hundred and eighty feet easterly of the southeast corner of Ninth Avenue and Fortieth-street, extending thence easterly one hundred feet on said street, being also about one hundred feet deep.

Charles E. Grant, by a written contract between him and William A. Foster, made and dated September 6, 1855, and sealed with their respective seals, contracted to sell said parcel of land

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(described as being four lots) to William A. Foster, for \$1900 per lot, being in all \$7600.

William A. Foster agreed to erect on said four lots six dwelling-houses of brick (three stories high), to be worth, when completed, \$4800 each, including the land on which it stood, and to be completed fit for occupation by the 15th day of February, 1856.

Grant also, thereby, agreed to loan to William A. Foster \$6000, to be expended in erecting said buildings, viz., \$1000 on each building; \$3000 to be advanced when "each of the buildings was inclosed and the roof finished," and the other \$3000 when "each building had the brown coat all on and the stair steps set."

The agreement to sell and convey, and to advance the \$6000, is declared to be "upon the express condition that if there is any failure by the party of the first part (Wm. A. Foster) to fulfil in all and every respect the stipulations and agreements on the part" (of said Foster) "in manner and form, and in all times therein mentioned, that then and in that case the interest of the" (said Foster) "his heirs and assigns of, in, and to the said lots and each of them, and the said buildings thereon erected, or to be erected, and each and every of them, and every part and parcel thereof, shall cease and determine, and the right of the party of the first part (Grant), and his heirs and assigns therein and thereto, be as full and complete as if this" (the said) "agreement had not been made."

If there should be any mechanics' lien on the premises when any part of the \$6000 (to be so advanced) was payable, Grant to be at liberty to satisfy the same, and the sums so paid were to be treated as so much of the said advance.

When the buildings were completed, Grant was to convey them to William A. Foster, on being paid in cash \$13,600. If William A. Foster could not get a loan on said houses to two-thirds of their value, as designated by such agreement, Grant was to take a second mortgage of \$3500 on all the houses and lots, payable in a year, in lieu of so much cash, provided that such mortgage and the prior mortgages did not amount (together) to more than two-thirds of such value.

Subsequently to the execution of said agreement, William A. Foster entered into a written agreement with Charles E. Foster

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(on the same 6th day of September, 1855), by which Charles E. Foster was to purchase said lots from William A. Foster, and erect buildings thereon, and William A. was to advance money to Charles E., to enable him to build; the said agreement being in its terms substantially like that between Grant and William A. Foster, except that Charles E. Foster contracted to pay \$2500 per lot.

Charles E. Foster immediately commenced the erection of said six buildings, but never completed but four of them. William A. Foster refused to advance to Charles E. all that he had agreed to do, alleging that he had no money, and that mechanics' liens had been put on the property; and Charles E., sometime in 1856, quit the premises.

Charles E. knew nothing of any contract between Grant and William A. Foster, until at or about the time of the refusal of William A. Foster to make further advances.

The plaintiff furnished lumber to Charles E. Foster to be used, and which was used, in the said buildings.

On the 22d day of November, 1855, the plaintiff filed with the clerk of the city and county of New York a notice under section 6 of the act (ch. 513) of 1851, of his claim, stating its amount at \$404.37, and to be for materials furnished to Charles E. Foster, and naming him as the owner of these lots and of the buildings thereon. This claim was dated and sworn to November 21, 1855.

Such proceedings were had, that on the 25th day of March, 1857, the New York Common Pleas gave judgment that this lien be foreclosed, and that all the interest which Charles E. Foster had on the 22d day of November, 1855, in the said buildings, and the lots on which they stood, be sold, and that \$486.55 be paid to the plaintiff out of the proceeds of the sale, in satisfaction of his claim, and the costs of such proceedings.

In June, 1857, the sheriff made a sale as directed by said judgment, and at such sale the plaintiff purchased Charles E. Foster's said interest in the premises in question. The sheriff's report of sale was filed June the 29th, 1857, and by a deed of the same date the sheriff conveyed to said plaintiff, as such purchaser, the interest of said Charles E. Foster in the premises, which he had on the 22d day of November, 1855.

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Grant and wife, by deed of June the 20th, 1856, conveyed the premises to John A. Foster.

John A. Foster and wife, by deed of April the 16th, 1857, conveyed them to David L. Reed.

David L. Reed and wife, by deed of April the 18th, 1857, conveyed them to Horatio Wild; Wild bought without any actual notice of the existence of the alleged lien of the plaintiff, or of any proceedings in respect thereto, and paid \$12,000, the consideration named in his deed for the premises in question, and an adjoining house and lot, and expended over \$1200 on the two buildings, to put the same into good tenantable repair, and in introducing Croton water.

Horatio N. Wild and wife, by deed dated August 29, 1857, conveyed said premises to Z. R. Simmons.

Z. R. Simmons and wife, by deed dated October the 1st, 1857, conveyed the premises to Philip Fitzpatrick.

Fitzpatrick and wife, by deed dated October the 3d, 1857, conveyed the premises to Edward P. Clarke.

Edward P. Clarke, by lease dated January the 30th, 1858, leased the premises to the defendant for one year and three months from the 1st day of February, 1858.

Each of the seven deeds last named was acknowledged and recorded at or near the time of its date, and contains covenants of seizure and warranty.

The defendant entered into possession of the premises in question under the lease to him from Edward P. Clarke, and was in possession when this action was commenced, which was on the 18th day of February, 1858.

Before this action was commenced, and after the defendant was in possession, the plaintiff demanded of him the possession of the premises in question, which demand the defendant refused to comply with.

Even if it be assumed that Charles E. Foster had such an interest or property in the six buildings as would make him the owner thereof, within the meaning of chapter 513 of the act of 1851, and of the acts amending the same, in such sense that a lien was created upon his interest therein by the notice which the plaintiff filed on the 22d day of November, 1855, it does not follow that this action can be maintained.

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Charles E. Foster never had any contract with Grant, the owner of the land, and he did not even know of Grant's ownership until about the time that his labors in the erecting of the buildings came to a stand.

But assuming that performance on his part of his contract with William A. Foster, would be in equity performance by the latter of his contract with Grant, still Charles E. Foster is not entitled even in equity to a conveyance of the premises in question, except on paying therefor in cash the contract price and the moneys advanced. He did not perform his contract. He finished only four of the six buildings. Two of the six he did not finish.

The legal title remained in Charles E. Grant, and was transferred by the several conveyances thereof, and ultimately vested in Edward P. Clarke, the defendant's lessor.

The extent of any interest and rights acquired by the plaintiff by his proceedings under the mechanics' lien law, was, at most, the right to be substituted in the place of Charles E. Foster, and to receive the benefits and advantages which his contract secured to him on performing the conditions, upon the performance of which his title to them was made by the agreement to depend.

The object of the act of 1851, as well as that of 1830 (ch. 330, and ch. 120 of *Laws of 1832*), is to reach, in the hands of the owner of the building, any balance which he may owe to his immediate contractor in respect thereof, by virtue of a contract between the two for the erection thereof. (*Loonie a. Hogan*, 5 *Seld.*, 435.)

The actual owner cannot be made to pay more than is due by the terms of his own contract, nor to pay upon any conditions other than those on which, by his contract, he is liable to pay. (*Carman a. McIncrow*, 3 *Kern. R.*, 70.)

Where labor is performed or materials furnished by virtue of or in pursuance of any contract or agreement with "the owner" of a building which is being erected or repaired, the filing of the prescribed notice (stating *inter alia* the alleged owner), creates "a lien for the value of such labor and materials upon such a house or building and appurtenances, and upon the lot of land upon which the same stand, to the extent of the right, title, and interest at that time existing, of such

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owner in the manner and to the extent hereinafter provided." (3 *Rev. Stat.*, 5th ed., 812, § 82.)

In this respect, the act of 1851 goes further than the act of 1831. The former creates a lien on the building and lot, while the act of 1831 created no lien upon the lot.

Whether the plaintiff acquired a lien to the extent of only Charles E. Foster's interest, or to the extent of Charles E. Grant's interest, will make a great difference in his rights. The case of *Ambony and Davis v. Jones* (19 *N. Y. R.*, 234), illustrates this to some extent.

In that case a tenant erected a building, which he had a right to remove from the premises. It was held that the mechanics' lien could be created on such building, and that by purchasing the tenant's interest in such building at a sale on foreclosing the lien, the purchaser could remove it.

But the idea is not suggested that any lien was created on the lot on which such building stood, or that the purchaser acquired any other rights than those which the tenant possessed.

In the present case, Charles E. Foster never became, either legally or equitably, the absolute owner of the buildings in question.

He could not even become such equitable owner otherwise than by a full performance of his contract.

In *Ambony et al v. Jones* (*supra*), the building was absolutely that of a tenant.

What rights the plaintiff might have had, had he performed Charles E. Foster's part of the contract, or had he offered to do so, and had not been allowed to do it, is a question which does not now arise.

It seems to me quite clear that the legal title continued in Grant down to the time he conveyed to John A. Foster, and that it was subsequently vested in the defendant's lessor.

That Charles E. Foster never acquired the equitable title, and that on his failure to complete the buildings, Grant had a right to the possession, as against Charles E. Foster, and all persons succeeding to his interest merely.

That the defendant, instead of entering unlawfully into possession, and unlawfully withholding possession, entered lawfully and is entitled to retain possession.

The complaint must be dismissed.

THE NEW YORK CAR OIL COMPANY *v.* RICHMOND.

New York Superior Court ; General Term, March, 1860.

EVIDENCE.—ORGANIZATION OF MANUFACTURING CORPORATION.—
DEMAND BEFORE SUIT.—FINDING OF REFEREE.

Proof of the incorporation of a manufacturing company may be made by producing a sworn copy of the articles of the association, and evidence that the originals were filed in the office of the county clerk, and that they have been lost, and by production of a certified copy of the duplicate filed in the office of the Secretary of State.

In an action for chattels, a demand before suit is only necessary where the chattels were lawfully in defendant's possession.

Where the same evidence on which the referee finds for the plaintiffs the question of title, supports the conclusion that the chattels were not in defendant's possession, the court on appeal will assume that no demand was necessary. If the defendant desires to raise the question, he should procure a specific finding thereupon.

A mere employée in charge of property cannot estop the owners by consenting to a levy thereon.

Appeal from judgment on the report of a referee.

The action was brought to recover the possession of eight and one-half casks of oil, and ten bushels of coal, and one tank of oil, the property of the plaintiffs, of which it was alleged the defendants had become wrongfully possessed, and which they wrongfully detained from the plaintiffs, who, as the complaint alleged, are a manufacturing corporation, organized under the act of February the 17th, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes."

The answer of the appellant, Richmond, who alone defended, denied that the plaintiffs are a corporation; denied that the plaintiffs owned or had any interest in the property; denied the taking or detention of the plaintiffs' goods mentioned in the complaint; and for further answer averred the recovery of a judgment, by said appellant, against the "American Oil Manu-

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facturing Company ;" the issuing of an execution thereon ; its delivery to the defendant, Springsteen, a constable ; the levy thereof upon property on the premises occupied by the American Oil Manufacturing Company, which property belonged to the last-named company, and was at the time in the custody of its agent, which property is partly described in the complaint.

On the trial before Daniel B. Taylor, Esq., to whom by consent the case was referred, the plaintiffs offered in evidence a copy of a certificate of association in the office of the Secretary of State. The defendants objected to the evidence, on the ground that it was not in compliance with the statute ; that the certificate of the county clerk of the fact that such certificate had been filed with him, should be produced.

The plaintiffs then proved by the deputy clerk from the county clerk's office, whose duty it was to enter such certificates in an index ; that he had searched in that office, and could not find any articles of association of the New York Car Oil Company on file, or in the office of the county clerk,—and by two other deputies, that the witness so examined had charge of the entering and filing of such certificates, and that one of the last-named witnesses, according to the routine of business, received such papers and the fee for filing, thirteen cents, and delivered them to the first-named witness the following morning, to be entered and filed in the proper place of deposit.

He then proved, by two witnesses, that the articles of association were executed in duplicate, one copy to be filed in the county clerk's office, and one to be sent to the Secretary of State, and one of those witnesses stated that there were three original copies, all executed ; that he filed one about the last of September, 1857, in the office of the county clerk ; that he handed to the person at the desk and paid him his charge, twelve or thirteen cents, and sent another copy to the Secretary of State.

The same two witnesses, and also a third, testified that in January, 1858, they saw those articles of association in the office of the county clerk, and examined them there, with a view to preparing the further certificate or report required by the statute, which must mean the report mentioned in the twelfth section of the act, stating the amount of capital paid in, and other particulars there mentioned.

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The copy produced was shown to be a true copy of the articles so filed, and it was received, in connection with the oral testimony, as proof of the incorporation of the plaintiffs.

The taking of the goods, or so much thereof as was recovered, was then proved, viz., eight barrels of oil and three barrels of coal, and their value ; but it was also proved that the person who had the care of the manufactory where the property was found at the time of the taking, told the constable and the defendant, Richmond, by whose direction the constable was acting, that the property belonged to the defendants, in the execution which he had held, viz., to the American Oil Manufacturing Company.

There was great conflict of evidence on the question whether the property belonged to the American Oil Manufacturing Company or to the plaintiffs, and whether in fact there was any such company as the "New York Car Oil Company,"—the defendants insisting that the whole claim of the plaintiffs was an artifice, resorted to to cover up and protect the property of the American Oil Company, by the pretence of having formed a new incorporation ; and the further pretence that the oil in question was manufactured and owned by a new incorporation, when in truth the machinery, the lease of the factory, and all of the property belonged to the former company, which confessedly had held the lease, owned the machinery, and carried on the business, and that this was done to avoid the payment of the debts of the American Oil Manufacturing Company.

Testimony was also given by the defendants tending not only to contradict, but to impeach the character of some of the plaintiffs' witnesses.

The referee found, as matters of fact and law, that the plaintiffs were duly incorporated ; that the property in question belonged to them ; that its value was \$310, and that they had sustained damages by the taking to the amount of \$20 ; and awarded the property to the plaintiffs, with their said damages and costs of suit. The defendants appealed to the general term, and the exceptions taken on the trial raised the points considered in the opinion of the court.

Mitchell Sandford, for the appellants.

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E. W. Dodge, for the respondents.

BY THE COURT.—WOODRUFF, J.—I. The first exception upon which the appellant insists as a ground of reversal, is, that the referee erred in admitting the certificates purporting to be a certified copy of the incorporation of the plaintiffs, filed in the office of the Secretary of State.

This exception may be properly considered in connection with another, viz., that the referee should have granted a nonsuit, as moved for by the defendants, on the ground that the plaintiffs did not sufficiently prove that they were duly incorporated under the act under which they claimed such incorporation, viz., the act of February 17, 1848. (*Laws of 1848*, ch. 40.)

In so far as these exceptions proceed upon the form of the certificate given in evidence, or the manner of its authentication, or any supposed defect therein, for want of compliance with the act, it must suffice to say that the appellant has not thought proper to embody the certificate of association, or the copy produced on the trial, in the case or bill of exceptions, settled and furnished to the Court of Appeals. We are, therefore, unable to discover whether there are or are not any such defects therein, and must assume that no such defects exist, and that the appellant does not rely upon any such defects as grounds of objection, nor were any defects in the form of authentication thereof suggested in the argument of this appeal; and we have only to inquire whether, under the circumstances proved at this trial, the production of a certified copy from the office of the county clerk could be dispensed with, and whether without such production the incorporation of the plaintiffs could be proved at all, and was sufficiently proved.

The act of 1848 requires that a certificate be filed in the office of the clerk of the county, and a duplicate thereof in the office of the Secretary of State; and, in the ninth section, the act provides that "the copy of any certificate of incorporation, filed in pursuance of the act, certified by the county clerk, or his deputy, to be a true copy, and of the whole of such certificate, shall be received in all courts and places as presumptive legal evidence of the facts therein stated."

In the first place, we do not regard this provision as necessarily excluding every other mode of proving the fact of incor-

poration ; it provides one mode of proving the fact, a simple, and in general an easy mode of doing so.

But if such certificate ought to be regarded as the best evidence, and, therefore, to be produced in the first instance, the rule requiring a party to produce the best evidence only holds when such production is possible ; and on its being shown that, for some reason not within the control of the party, the best evidence cannot be produced, secondary evidence may be given.

Hence the plaintiffs proved, by evidence satisfactory to the referee, that the certificate was duly executed, and was filed with the county clerk, and the fees paid. The party was no longer responsible for the safe-keeping of the certificate, and if it was lost by the county clerk after it had been left with him, the party could not be prejudiced thereby, if he could prove the fact by other competent testimony. This the plaintiff did by the best evidence that can be suggested. They proved the fact of filing, and they proved the contents of the paper filed by the production of a copy sworn to be a true copy of the certificate. From the necessity of the case, resulting from the loss of the paper filed, it was impossible that the county clerk could certify the paper produced to be a copy, and the plaintiffs were not responsible for the inability of the clerk to certify, and should not be prejudiced by it. Any other doctrine would render the proof of the existence of any corporation so organized dependent upon the care of the county clerk in preserving papers filed ; and in case of the accidental destruction of papers in that office render such proof wholly impossible. No such doctrine can be admitted for a moment.

In the next place, if the contents of the certificate could not be established by parol evidence, or by a sworn copy, the duplicate produced from the office of the Secretary of State, was the highest evidence. It was proved that the certificate was executed in duplicate, and one was filed in the office of the Secretary of State. A copy of this was produced, and was not only so certified, but was also sworn to be a true copy. We have no hesitation in saying that, even if there were no other provision by statute bearing on this subject, this proof of the plaintiffs' incorporation was, after proof of the loss of the paper filed by the county clerk, competent and sufficient.

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Again: the certificate was filed in the office of the Secretary of State, in compliance with the express provisions of the law; and by the general laws of the State (1 *Rev. Stat.*, 166, § 4), it is enacted that "all copies of records and papers in the office of the Secretary of State, certified by him, and authenticated by the seal of his office, shall, in all cases, be evidence equally and in like manner as the original."

These views are sufficient; and we think they conclusively dispose of all objections founded on the idea that the plaintiffs were bound to prove their incorporation by producing either the original or a certified copy thereof from the county clerk's office; and, as already suggested, the appellant not having seen fit to insert the paper or papers in his case or exceptions, we have no means of examining the contents, or form, or authentication thereof, to determine whether they are, or are not, a compliance with the statutes. The finding of the referee, therefore, must stand unimpeached by any thing appearing before us on this appeal.

II. The next objection urged upon our attention is, that the plaintiffs should have proved a demand of the property before action brought.

Where property is levied upon and taken by a sheriff or constable under an execution, and it appears that when the levy was made, the property was in the actual possession of the defendant in the execution, the sheriff or constable may be entitled to a demand of the property before action brought for such taking. It does not follow that the plaintiff in execution actually directing such levy and taking, is entitled to any such demand, if, in truth, the party so in possession has no leviable interest in the property taken.

In this case, Springsteen, the constable, made no defence; he suffered judgment by default; as to him, therefore, the question does not arise.

But the very question, in whose possession was the property found? was one of the questions most severely contested on the trial. The same proof that bore upon this question, bore also on the inquiry whether the property belonged to the plaintiffs or to the defendants in the execution; and it is, we think, entirely clear, that if the proof did not establish that the property belonged to the defendants in the execution, then it did

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not prove that the property, when levied upon, was in the possession of those defendants.

The referee has found that it was the plaintiffs' property, and, unless that finding was against the evidence, we must regard the same proofs as establishing this point also; and if the defendant desired a specific finding upon the question, from whose possession was the property taken? he should have called the attention of the referee to that subject, and procured such finding thereon. In the absence of such finding, we must take the fact to be favorable to the plaintiffs who have prevailed, since the evidence would, we think, clearly warrant such a finding. (*Fish v. Wood*, 4 *E. D. Smith's R.*, 627; *Hardin v. Palmer*, 2 *Ib.*, 172; *Viele v. The Troy and Boston Railroad Company*, in Court of Appeals, December, 1859.)

It is only when the property is lawfully in the possession of the defendant that a previous demand before suit brought is necessary.

III. It is claimed that, inasmuch as the person in charge of the manufactory pointed out the property as the property of the defendants in the execution, the plaintiffs are, therefore, concluded.

The mere circumstance that Hazzard, the person referred to, was in the employment of the defendant, wrought no such consequence. He was not the general agent of the defendant. It is testified that one Griffin was the plaintiffs' agent; that Hazzard stayed there and watched the building; was employed to take in and put out goods, and to watch the premises, and sometimes sold small quantities of oil. He could not estop the plaintiffs by consenting to a levy in satisfaction of the debt of a third person, any more than he could lawfully deliver the plaintiffs' property to the defendant (the judgment-creditor) in payment of his judgment. Besides, Hazzard testified that he requested the defendants not to take the property, and that while he remained there they did not remove it; but he locked the door and left, in order to find and consult the plaintiffs' agents, and in his absence the defendants, by some means, opened the door, and were removing the oil when he returned.

IV. It only remains to consider, whether the finding of the referee, that the property was the property of the plaintiffs, was so against the weight of the evidence, that the judgment should be reversed upon that ground.

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It must be considered that there were many circumstances of suspicion in respect to the title of the plaintiffs to the manufactory, and the machinery therein; and there was proof that the machinery had been claimed and taken by the American Oil Manufacturing Company (the judgment-debtors) by process in a replevin suit that was still pending. The proofs relating to the incorporation of the plaintiffs; the ignorance of Hazzard, one of the employees in the factory, that there was any other company than the American Oil Manufacturing Company, and many other circumstances were justly calculated to create the suspicion that the last-named company, having become embarrassed, the scheme of forming, or pretending to form, a new company, was devised by its managers, in order to avoid the payment of the debts of the old company, and yet obtain the possession and enjoyment of its property under a new name.

But, on the other hand, there was positive proof that the new company was incorporated. There was some evidence that the new company purchased the machinery and lease of the factory, and the proof was uncontradicted that the oil in question was manufactured by the new company.

In a great conflict of evidence tending to establish either claim, we cannot say that the referee so erred in his conclusion that his finding should be set aside. We could not do this even if we thought we should have formed the opposite conclusion.

An attempt was made to impeach the plaintiffs' witnesses; on the other hand, their characters were supported by other testimony. The case depended in no slight degree upon the credibility of the witnesses whom the plaintiffs produced; and if their testimony was believed, the case was clearly with the plaintiffs; the oil was their property.

Under such circumstances, the finding of the referee must be taken by us as conclusive.

The judgment should, therefore, be affirmed with costs.

WILLET *a.* THE EQUITABLE INSURANCE COMPANY.*Supreme Court, First District; Special Term, December, 1859.*

ATTACHMENT.—LEVIABLE PROPERTY.

A debt due, by a foreign corporation which has no agency in this State, to a non-resident of this State, is not the subject of attachment as a provisional remedy under the Code, in an action by third parties against the non-resident.

Trial by the court without a jury.

This was an action brought by the sheriff to recover against the defendants, a foreign insurance company, a debt owing by them for a loss on policy to *Cooke & Barton*, residents of another State. The debt was attached by the sheriff in an action brought by D. Appleton and others, the virtual present plaintiffs against *Cooke & Barton*, and this action was brought by the sheriff to collect and reduce the debt into possession under the attachment.

J. M. Van Cott, for the plaintiff.—I. Debt has no locality. Payment is a duty the debtor owes to his creditor, and it may be enforced by the creditor wherever he finds the debtor. Being found here, these debtor defendants may be sued here for the debt if there is a creditor here to sue them.

II. If the presence of a creditor *here* is necessary, as is urged for the legal conception of the debt, the creditors of these defendants are *constructively* here. There being a debt due from a debtor here, the Legislature subjects such debt to the process of the domestic creditors of the foreign creditor to whom it is due.

III. A foreign corporation having an agent in this State may be sued here, by the service of process on such agent. Such process was served, and the defendants are in court, not only without objecting to the jurisdiction, but answering to the merits, and expressly submitting themselves to the jurisdiction.

Reluctant 11 Oct. 11. 6. 1859.

Willet *a.* The Equitable Insurance Company.

IV. Foreign corporations sue and are sued in our courts every day. The local being of a corporation may be admitted for certain purposes.

J. W. Gerard, Jr., for the defendant.—I. The attachment on the debt due by this Insurance Company to Cooke & Barton, both being non-residents, and the property not within this State, was not operative on such property. All debts follow the *situs* of the creditor. (Wilson *a.* The Mayor, &c., 1 *Abbotts' Pr. R.*, 4.) This debt was not property in this State within the meaning of the Code. It was not within the jurisdiction of the court or the grasp of the sheriff. Consequently the action to reduce such debt into possession must fail, and the judgment against Cooke & Barton (they not appearing), obtained by virtue of such attachment, was void for want of jurisdiction. (Bates *a.* The New Orleans, Jackson, and Great Northern Railroad Company, 4 *Abbotts' Pr. R.*, 72; S. C., 13 *How. Pr. R.*, 516.)

II. The mere fact of a copy of the attachment having been left with an agent of these defendants, who was temporarily in this State, does not alter the *status* of the claim or the rights or obligations of the parties. A corporate body created by a foreign State, has no corporate existence beyond the limits of the territory of the government which created it. (Day *a.* Newark India-Rubber Manufacturing Company, 1 *Blatchf. C. C. R.*, 628.)

JAMES, J.—This cause came on for trial by the court without a jury, a jury being expressly waived by the parties, and after hearing the proofs of the parties, and the argument of counsel, I hereby report the following facts, with my conclusions of law thereon:

1. The plaintiff is the sheriff of the city and county of New York.

2. The defendants are a foreign corporation with an agency in New Jersey, and none in the State of New York.

3. Cooke & Barton are non-residents of this State, and were indebted to Appleton & Co., of the city of New York.

4. The defendants are, and were in January, 1858, indebted to Cooke & Barton for a loss on a policy of insurance amounting to \$5000.

Willet *v.* The Equitable Insurance Company.

5. On the 25th day of January, 1858, said Appleton & Co. commenced an action against said Cooke & Barton in the Supreme Court of this State by summons and attachment; the said sheriff by virtue of said attachment claimed to have seized and taken thereof the said debt due by the defendants to said Cook & Barton; that said seizure was made by delivering to the agent of defendants, resident in New Jersey, while temporarily in the city of New York, a certified copy of said attachment, with a notice of the property levied upon.

6. The summons and complaint was only served by publication, and such proceedings were thereupon had; that on the 17th day of May, 1858, the said Appleton & Co. recovered judgment in the action against said Cooke & Barton for \$3309.91; that no property other than the claim due from defendants was seized under said attachment, and that the judgment recovered remains wholly unpaid.

7. That previous to the copy of this attachment and notice being left with the said agent of the defendants, certified copies of three other attachments against said Cooke & Barton had been left with him by the plaintiff as sheriff, one for \$1240, another for \$1613.39, and the third for \$250, with notice that said claim was levied upon.

8. It was not shown that judgment was ever perfected in either of said three attachments.

9. The indebtedness from the defendants to Cooke & Barton at the service of the attachments was \$5000, and the interest since is \$671, making in all, at this date, \$5671.

10. That the amount due upon the judgment in favor of Appleton & Co. is \$3681.91.

From these facts, my CONCLUSIONS OF LAW are:

1. That the plaintiff acquired no right to, or interest in, the debt due from The Equitable Fire Insurance Company, to Cooke & Barton, under, through, or by virtue of the warrant of attachment in favor of Appleton & Co. against Cooke & Barton, issued and delivered to him.

2. That the said debt was not property, or a debt within this State, so as to be reached by said attachment.

3. I therefore order the complaint to be dismissed, and judgment for the defendants, with costs of the action.

McButt *a.* Murray.

McBUTT *a.* MURRAY.*New York Common Pleas; Special Term, January, 1860.*

JURISDICTION OF STATE COURT.—PARTIES.

The fact that the goods to recover possession of which an action is brought in a State court, are detained under claim by a quasi government official of the United States,—*e. g.*, the keeper of a bonded warehouse,—where the government makes no claim in respect to the goods, does not constitute any objection to the jurisdiction of the court.

Motion to dismiss complaint.

HILTON, J.—The plaintiffs stored a quantity of goods with the defendant, who was keeper of a government bonded warehouse; all the duties having been paid, the defendant detained the property, claiming a lien upon it for storage to a greater amount than the plaintiffs considered him entitled to under the contract previously made between them respecting the storage; and, thereupon, this action was brought, claiming the delivery of the property, and which it is admitted has been taken by the sheriff and delivered over to the plaintiffs.

The defence set up is, that the defendant had a lien upon the goods for storage, and rightfully detained them until the lien was discharged.

The plaintiffs having rested, I am asked to dismiss the complaint upon two grounds. 1st. That this court has no jurisdiction of such an action, because the goods were detained by defendant under the authority of the revenue laws, and the regulations of the department made in pursuance of those laws. 2d. That if an action of this nature will lie, there is a defect of parties. That the goods being in the joint custody of the custom-house officer and the defendant, both should have been joined as parties defendant.

I am unable to perceive how either of these objections can arise in the present case. The action is of the ordinary kind for the purpose of enforcing the plaintiffs' right to their property,

illegally detained from them. The government makes no claim in respect to the goods,—all duties on them having been paid,—and, therefore, it cannot be said that they are detained under any revenue law of the United States.

The fact of the defendant being a quasi government official is not of itself sufficient to deprive a State court, of jurisdiction of an action against him, even when he claims to have acted in his official capacity in respect to the matter which is the subject of the suit; showing as a defence that his conduct complained of was within the requirement of a positive law of the United States, would probably entitle him to a judgment in his favor, but does not deprive the local common-law tribunals from passing upon the question, as to whether he so acted. (*Teall v. Felton*, 1 *Comst.*, 537.)

The objection that there is a defect of parties defendant, not having been taken either by demurrer or answer, must be deemed waived. (*Code*, §§ 144, 148.) And, indeed it seems to me, that a fatal answer to the objections is, that the defence upon which they are predicated does not arise upon the pleading.

Motion to discharge complaint denied.

BOSTWICK *v.* BEIZER.

New York Common Pleas; Special Term, February, 1859.

RECEIVER IN SUPPLEMENTARY PROCEEDINGS.—ASSIGNEE FOR BENEFIT OF CREDITORS.

A receiver in supplementary proceedings is not trustee alone for the parties at whose instance he was appointed, but for all the creditors of the judgment-debtor.

He is to administer the property vested in him, under the direction of the court, for the benefit of all, first discharging those debts which have acquired an equitable priority.

The receiver in supplementary proceedings brought an action to set aside an assignment for benefit of creditors made by the judgment-debtor, and obtained judgment therein.

See 40 N.Y. 6

Bostwick *a.* Beizer.

Held, that the judgment should allow to the assignee all payments made under the assignment to others than himself prior to the commencement of the action.

Action by a receiver of the property of a judgment-debtor appointed in supplementary proceedings.

HILTON, J.—A receiver appointed under the provisions of the Code, upon proceedings supplementary to execution, becomes, immediately upon his appointment, vested with the entire property, both real and personal, of the judgment-debtor; and he does not hold the property thus vested in him as trustee only for the plaintiffs in the judgment and proceedings in which he is appointed, but he represents *all* the creditors, and is *trustee for all*.

As such he may institute proceedings to set aside fraudulent conveyances and transfers made by the debtor, and which are either void at common law or forbidden by statute; and upon the court declaring such transfers void, the entire property of the debtor covered or affected by them, passes to the receiver, who becomes, as is said in *Porter a. Williams* (5 *Seld.*, 142, 150), a trustee for all parties, and is bound to apply the effects of the debtor faithfully to the payment of the debts, according to their *legal* or *equitable* priorities; and if any thing remains, to restore it to the debtor or his grantee.

In an action of this nature he represents the interests of all the creditors, and the estate which comes to his hands belonging to the debtor is to be administered by him under the direction of the court for the benefit of all, first discharging those debts which have acquired an equitable precedence. (*Corning a. White*, 2 *Paige*, 567; *Porter a. Williams*, *supra*; *Chautauque County Bank a. White*, 2 *Seld.*, 236.)

In settling the decree it has been shaped in accordance with these views, allowing the assignee all payments made under the assignment, to others than himself, prior to the commencement of this action.

BANKS *a.* TAYLOR.

Supreme Court, First District; General Term, December, 1859.

EXECUTORS AND ADMINISTRATORS.—ACCOUNTING.—APPEAL FROM
SURROGATE.—GUARDIAN AND WARD.

The surrogate has not jurisdiction to settle the accounts of a guardian upon an accounting sought by the same party, by a petition in his character of administrator.

A petition of appeal from an order of the surrogate assuming to settle the accounts of the guardian upon such a petition, need not specify the items.

Of the duty of executors and administrators in reference to personal property reserved for the use of the family.

Payment of expenses of the real property on the order of the heir, who is also one of the next of kin, is a payment to such person as one of the next of kin.

A guardian whose ward succeeds to land subject to a mortgage, may, under 1 Revised Statutes, 749, appropriate the personal property in payment of the mortgage.

Appeal from a decree made by the surrogate in the final settlement of accounts rendered by the defendants.

The facts are stated in the opinion.

BY THE COURT.*—ROOSEVELT, J.—Several questions were embraced in the appeal, but the principal point was, whether accounts filed by defendants as “guardians” were properly passed on and allowed by the surrogate; or whether his jurisdiction was confined, under the circumstances of the case, to the accounts which they submitted in their capacity as administrators. It appeared that the petition presented to the surrogate by the defendants was confined to their character as administrators. It made no allusion to any guardianship for the children, or either of them. It simply stated “that letters of administration on the estate of David Crocker, deceased, were granted to your petitioners on the twenty-third day of May, 1838,” and

* Present, ROOSEVELT, SUTHERLAND, and INGRAHAM, JJ.

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that the petitioners "were desirous of rendering a final account of all their proceedings to the surrogate of the county of New York, by whom your petitioners were appointed," and prayed that a citation might issue "to all persons interested in the estate of the deceased to attend a final settlement of the account of their proceeding." And, the citation so issued at the instance of the petitioners, and served on Mr. Banks, the appellant, required all persons interested in the estate (Mr. Banks being one) to appear before the surrogate, at the time and place specified, "then and there to attend the final settlement of account of the proceedings of Eliza C. Crocker and Thomas C. Taylor as administrators of the goods, chattels, and credits of said deceased."

No amendment was subsequently made enlarging the subject or object of the petition as originally presented, and no averment even of any guardianship, except in the production of the letter of guardianship, to show who were entitled to represent the infant next of kin as such on the taking of the accounts of the administrators. On the contrary, the title of the proceedings, many times repeated, from the original petition to the final decree, was uniformly "In the matter of the final accounting of Eliza C. Crocker, administratrix, and Thomas C. Taylor, administrator, of David Crocker, deceased."

It seems perfectly clear, therefore, that that part of the surrogate's decree, the last clause but one, which attempts to pass upon the accounts between the infants, and their guardian, was *coram non judice*, and ought to be stricken out. Although void as a judicial proceeding, its continuance in the decree may lead to future embarrassment. The point raised by it not being a question of the allowance or rejection of any particular items of the account, but a question of jurisdiction, the rule did not require that the items involved should be "specified in the petition of appeal." It was sufficient that the party objecting appealed from every part of the decree, and especially from the "retrospective allowance for the support and maintenance of the family of deceased at the rate of \$2500 per annum," as being "wrong in principle and unjust as to amount."

We do not mean to say, however, that a retrospective allowance to a guardian, being the mother, for the support of her ward, may not be made as an approximate estimate of the entire cost,

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or that the contract indicated in the decree was unjust. It is enough on this appeal to decide that the question was not legally before the surrogate to be passed upon by him. He had a right to allow the charges as moneys paid by the administrators to the guardian, but not as moneys paid by the guardian for the ward. The guardian was entitled to demand the whole of the infant's share of her father's personal estate, and of course the administrators were entitled to pay it to her. How she applied it was no concern of theirs. She was to respond, not to them, but to her ward and to her ward's surviving husband, for all she received, or with due diligence might have received, in a proper action between him and her, and no one else, for that purpose. When called upon in that character and in that manner by him, she will no doubt be prepared, so far as these items are concerned, to render an account of her guardianship.

As to the furniture left by the intestate, the disallowance of which constitutes another objection to the decree, it belongs one-third to the widow and one-third to each of the two children. The administrators, therefore, discharged themselves of this item by handing over the whole to her, instead of selling it and paying her the proceeds. She took one-third in her own right, and two-thirds as guardian. Whether in twenty years' use it has been substantially used up as alleged, and as is very probable, we need not at present inquire. Nor, under the present circumstances, do we think it worth the inquiry of the appellant; except to show, at the proper time, that a proportionately less allowance was necessary for the support of the children.

As to the real estate, the administrators, as such, were not accountable for its rents, nor liable for its taxes or repairs. Their payments, in that respect, like the others above referred to, can only stand on the footing of payments to the guardian, to be accounted for by her whenever called upon in that capacity.

The guardian alone had charge of the infant's interest in the real estate. But the payments were made on her order, and, in law, therefore, were made to her. If these views are correct, and we see no reason to doubt their accuracy, the whole personal property, to which Mrs. Banks was entitled as one of the next of kin of her father, has been duly accounted for by the administrators of her father, except the sum of \$4659.25 in

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money, and a few shares of bank and insurance stocks, which the decree of the surrogate has directed to be paid and transferred to her surviving husband. With these exceptions, Mr. Crocker, as guardian of the late Mrs. Banks, in effect admits she has received the whole personal estate of her deceased daughter, and is accountable for it to her daughter's representatives. This discharges the administrators, and leaves the appellant to seek his remedy, beyond the amount so provided for, against his late wife's mother, should he be dissatisfied with the mode in which, as guardian, she has discharged her trust. Whether the amount claimed by her as an allowance for the proximate actual cost of the education and maintenance of her child, be too large or too small, is a question, as before stated, which we are not now called upon to decide; and we, therefore, give no opinion upon it, except so far as to say that it should be settled, if possible, by the parties themselves.

Something was said on the argument in relation to a mortgage executed by Mr. Crocker in his lifetime for \$10,000. By the statute (1 *Rev. Stat.*, 749) it is provided that the heir in such case shall satisfy the mortgage without resorting to the administrator. If, then, it was the duty of Miss Crocker to satisfy this mortgage, it was the duty of her guardian to do it for her; and the appropriation for that purpose made long before her marriage to Mr. Banks, if made at all, although it diminished to that extent the personal property for the benefit of the real, was binding on her, and, of course, on him. It was an appropriation of the property of the ward to pay an obligation which the law had made the debt of the ward, and which it had declared it her duty to satisfy and discharge out of her own property, without specifying whether real or personal, and which the guardian, therefore, it being most beneficial to the ward, was authorized and bound to discharge out of that which was most convenient, and at the same time most insecure, the moneys in hand.

SCHUHARDT *a.* ROTH.

Supreme Court, First District; Special Term, March, 1860.

ENTRY OF JUDGMENT.—SERVICE BY MAIL.

Where service by mail may be made, an order extending time to answer obtained and mailed on the last day of the time to answer, is sufficient to prevent the plaintiff from regularly entering judgment as upon failure to answer.

Though defendants show no excuse for not earlier attending to the action, and there is some color for supposing their object to have been delay, yet where they are strictly regular in the service of an order extending their time to answer, they are entitled to the benefit of the order.

Motion on the part of defendants to vacate a judgment and execution for irregularity.

It appeared that plaintiff's attorneys resided in New York, and defendants' attorneys in Troy. The time to answer expired January 16, 1860. On that day defendants' attorney, at Troy, obtained an order extending the time to answer twenty days, and duly served such answer by mail; that is, by depositing the same in the post-office at Troy, directed to plaintiff's attorneys, at New York, and paying postage. The order was not received by plaintiff's attorneys until 18th January, after they had, on that morning, entered judgment in the action, and issued execution, and they then gave defendants' attorneys notice that the papers so served would be disregarded.

J. Francis Walton, for the motion.—I. Under sections 410 and 411 of the Code, the service was valid, even though the papers served were deposited in the post-office after the closing of the mail on the last day. (*Noble a. Trotter*, 4 *How. Pr. R.*, 322.)

II. This motion is made as a matter of right and not of favor, and affidavits showing that the order extending time was improvidently granted are inadmissible.

Tiffany *a.* Williams.

James W. Gerard, Jr., opposed, claimed that plaintiffs, having entered judgment in ignorance of any order extending time to answer, and in good faith, were not obliged voluntarily to relinquish their judgment; and submitted that the court ought not to open the judgment except upon terms.

BONNEY, J. (after stating the facts).—The motion must, I think, be granted. The service of the order was regular, and in time to stay plaintiff's proceedings, although not received until two days afterwards, and after judgment had been regularly and properly entered, according to all information which plaintiff's attorneys then had. The defendants show no cause why earlier attention to the action was not given, and there is reasonable ground, at least, for believing that their object was delay. Still they were strictly regular (*Code*, §§ 410, 411), and entitled to the benefit of the order, on receipt of which plaintiff's attorneys should, I think, have moved to vacate it, or have opened the judgment and waited for an answer.

Motion granted, with \$10 costs, to abide the event of the action.

TIFFANY *a.* WILLIAMS.

New York Common Pleas; Special Term, March, 1860.

PLEADING.—DENIAL.

In a complaint in an action brought by an officer of a joint-stock company, the allegation that the company is a joint-stock company or association, consisting of more than seven shareholders or associates, is,—under the act of 1849 relative to such suits,—a material and issuable allegation.

Demurrer to answer.

The action was brought by plaintiff as treasurer of the Racket Court Club, to recover rent. The contents of the pleadings sufficiently appear in the opinion.

Tiffany *a.* Williams.

BRADY, J.—There is but one question presented by the demurrer in this case, and that is, whether it is competent for the defendant to put in issue the allegation of the complaint, “that the Racket Court Club is a joint-stock company or association, consisting of more than seven shareholders or associates,” by simply denying the fact. It is certainly necessary to the success of the plaintiff, as treasurer of such a club, to prove its existence, because it is evident that this action was brought in reference to the statute of 1849, relating to joint-stock companies or associations, and acts amendatory thereof. (See 3 *Rev. Stat.*, 5th ed., 777.) The capacity of the plaintiff to sue is not questioned, and on the authority of *Hastings a. McKinley* (1 *E. D. Smith*, 273), it could not be on the trial. The defendant, in effect, admits the capacity of the plaintiff to sue, provided the club which he represents existed as alleged, and it seems to me that he can, by a denial of such existence, put the plaintiff to the proof thereof. If such associations were made by law corporations, the defendant would have to set up as a defence that the club was not, in fact, a corporation, if he desired to avail himself of such a defence. (*Union Mutual Insurance Company a. Osgood, &c.*, 1 *Duer*, 707.) But the acts referred to provide that nothing contained in them shall be construed to confer on joint-stock companies or associations any of the rights or privileges of corporations.

The plaintiff relies upon *Hastings a. McKinley* (*supra*) to show that a mere denial of the allegation referred to is not sufficient to create an issue, but it is not an authority on the question suggested. The court held that it was too late for the defendant to object, after answer, that a married woman could not sue without a next friend, because that defect was apparent on the face of the complaint, and not being objected to by demurrer or answer, was waived. Not so in this case, however, as already shown, because the defendant, by his answer, denies that the club is a joint company or association. This is the only mode in which the fact could be put in issue, and to deny the right to put it in issue would in effect preclude the defence that no such company or association existed. (See *Tibbets a. Blood*, 21 *Barb.*, 650.)

Upon the other questions, I consider the case of *Edgerton a. Page* (18 *How. Pr. R.*, 359; *S. C.*, 10 *Abbotts' Pr. R.*, 119), conclusive against the defendant.

 Chambers *a.* Lewis.

The defendant is entitled to judgment on the demurrer, with liberty to the plaintiff, however, to withdraw the demurrer on payment of costs.

Order accordingly.

CHAMBERS *a.* LEWIS.

New York Common Pleas; Special Term, March, 1860.

ELECTION OF REMEDIES.—COMPLAINT.

In an action for wrongfully taking and detaining personal property, the complaint demanded judgment for damages in the amount of the value of the property, with interest.

Held, the summons not being before the court, that it was not to be deemed that plaintiff's action was founded on a waiver of the tort, and a resort to an implied promise to pay, but that the foundation of the action was the tort. Of the election of remedies under the Code.

Demurrer to complaint.

The facts are stated in the opinion.

BRADY, J.—It seems to be settled upon principle, and the weight of authority, that where goods are wrongfully taken or detained, the plaintiff may waive the tort, and bring an action upon an implied promise to pay for them. (*Butts a. Collins*, 13 *Wend.*, 154; *Putnam a. Wise*, 2 *Hill*, 140, and cases cited in note; *McKnight a. Dunlop*, 4 *Barb. S. C. R.*, 36; *Carey a. Green*, 3 *How. Pr. R.*, 376; *Hinds a. Tweddle, &c.*, 7 *Ib.*, 278.) But an examination of the cases will show that where the tort was waived, the action was in form, not trover, but assumpsit. Under the Code assuming the right of election to exist, there is a difference in the remedy. If the action be for wrongfully taking or detaining property, the defendant may be arrested, but not if it be to recover a sum of money arising upon contract, unless the defendant was guilty of a fraud in contracting the

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debt. It may be that the conversion of property would be a fraud for which the defendant could be arrested, and that the right to arrest would exist, although the action were for money due as upon a sale or purchase of the goods converted; but I do not think the courts would extend the remedy to such a case. The debt referred to must be one expressly contracted, and not one growing out of implied obligations, or created by operation of law. But how is the election to be determined in cases under the Code? The complaint must state the facts constituting the cause of action, and they are, that the defendant took or detains property of the value of a sum named, and the prayer is for judgment for the value of the property, with interest. In trover, under the old system of pleading, the declaration was very different from the declaration in assumpsit for goods sold, and there could be no difficulty in determining the form in which the plaintiff presented his demand. He must now recover upon the facts, and if his summons be for a money demand on contract, there can be no doubt of his election; but the summons forms no part of the pleadings, and I cannot, by reference to it, determine whether the plaintiff has elected what form his action shall assume. The prayer for relief may sometimes determine the question, and I think does in this case. The plaintiff prays judgment for the sum of six hundred and forty dollars, which is the value of the property detained, with the interest thereon. This is precisely what the law of damages would give him in an action to recover for the wrongful detention of the property, leaving the question of value open to dispute. (*Stevens v. Lowe*, 2 *Hill*, 132; *Dillenback v. Jerome*, 7 *Cow.*, 294; *Kennedy v. Strong*, 14 *Johns.*, 128.) It is true that such would be the rule, if the action were to recover as for goods sold, although the pleader might then allege the goods reasonably worth the sum named. In this case the plaintiff insists that the action is in tort, on the nature of the old action of trover, and the defendant insists that it is not. In form, under the Code, it may be either, because the facts are the same; but it is clear that on the complaint the plaintiff would be entitled to an order of arrest, and the action must be regarded as of the character claimed by him. It may be that the defendant is right, but he has proceeded upon the supposition that the complaint was in form one not only for the recovery of the value of the goods

 Kelly's Application.

converted, but one in which the tort was waived. I have been unable to arrive at such a conclusion, although I have given this case a great deal of attention and consideration. I thought the question very embarrassing; and the views which I have adopted not having been suggested on the argument of the demurrer, I have been more cautious and deliberative in making them the basis of any judgment. If the defendant had produced the summons, the result might have been different.

The plaintiff is entitled to judgment, but leave is granted the defendant to amend on payment of the costs of the demurrer.

 KELLY'S APPLICATION.

New York Common Pleas; Special Term, April, 1860.

PROCEEDINGS TO ENFORCE PAYMENT OF TAX.

Of the requisites of the petition for enforcement of payment of personal tax under the act of 1843 (*Laws of 1843*, ch. 230, Art. II., § 12; same statute, 1 *Rev. Stat.*, 5th ed., § 63), and the time within which such proceedings may be commenced.

An application, which may be the foundation of an arrest, should be verified.

Application to enforce payment of personal tax.

BRADY, J.—I. The receiver of taxes has no authority to collect taxes until the assessment-roll, with the warrant annexed, provided for by the statute (1 *Rev. Stat.*, 5th ed., § 43), is delivered to him. There is no statement in the application made herein that the receiver possessed such roll and warrant. It is alleged that Schuyler was duly assessed, and that such assessment was duly confirmed, according to the statute in such case made and provided. This may be, and yet the assessment-roll and warrant might not have been delivered. I admit that such an omission is a mere possibility, but we are dealing with a penal statute relating to the collection of taxes, and nothing can be assumed.

*Followed
HARRIS, S. 11, 12.*

Kelly's Application.

II. The application to enforce the payment of a tax should be made within one year after the 15th of January succeeding the year for which the tax is imposed, if the application be predicated of the *neglect* of the party taxed to pay, inasmuch as the receiver, until the 15th January, has no power to issue a warrant; and inasmuch as the person taxed having until that day to pay, before compulsory process can be issued against him, cannot be considered as neglecting to pay until that day. If the application, however, be based upon the refusal to pay, then the application may be made within a year after such refusal. (See 1 *Rev. Stat.*, 5th ed., 964, 965, §§ 50, 53.)

III. I think the receiver of taxes is not called upon to state upon what facts and circumstances he has reason to believe that the person taxed has debts, &c., under the provisions of § 53, *supra*. It is enough that he states that he has reason to believe. The statute vests in him the discretion to apply for the enforcement of the tax, and when the application is made, if the reason be unfounded, the person proceeded against can show it. The allegation on the language of the statute is sufficient to put him to his proof.

IV. The allegation that Schuyler was assessed in the city of New York, where he resided when the assessment was made, is a sufficient statement of the fact that the assessment was made in that city, although inferentially made. The statute provides that every person shall be assessed in the town or ward where he resides, when the assessment is made for all the personal estate owned by him; and if he reside in two or more towns, his residence shall be deemed and held to be in the county in which his principal business is transacted. (1 *Rev. Stat.*, 5th ed., 908.)

The allegation, therefore, that the assessment was made where Schuyler resided when made, is sufficient to show that it was assessed in New York.

V. The application by James Kelly, receiver of taxes in the city of New York, is a sufficient description of his office for the purposes of this application, doubtless, but it would be better to state fully the appointment under which he claims to act.

These embrace all the objections presented for consideration; and, as I am of the opinion that the application should be dismissed, because of the omission to state that the assessment-rolls and warrant annexed were delivered to the receiver, what is

Kelly's Application.

said in addition is by way of suggestion, in the hope that myself and associates may be relieved from considering, on each application, objections that may be obviated by a more elaborate statement of the facts necessary to confer upon the court the power to act.

I think the petition should show:

I. That James Kelly was duly appointed Receiver of Taxes in the city of New York.

II. That a tax was levied upon personal property in the city of New York, for the year named, according to the statute in such case made and provided.

III. That the person proceeded against resided in that city, and was assessed as a resident thereof.

IV. That the assessment having been confirmed according to the statute in such case made and provided, the assessment-roll was delivered to the receiver of taxes, with the warrant attached, according to the statute in such case made and provided.

V. That the person taxed having failed to pay the tax imposed, a warrant was issued upon, or subsequent to, the 15th January following the year for which the tax was imposed; or,

VI. That a demand was made after the 15th January, either by the person having the warrant or some person authorized thereto; and,

VII. That the receiver makes the application, and has reason to believe that the person proceeded against has debts, &c.

These facts should be stated absolutely, and not inferentially, and the application should be verified by the receiver to prevent doubt upon the subject. Applications to courts for process of imprisonment are generally, if not universally, on affidavit, and there is nothing in the statute excepting this proceeding from the general rule.

The present application, for the reason assigned, will be dismissed, without costs, and without prejudice to the right to renew.

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The Quarry Company *a.* Bliss.

THE QUARRY COMPANY *a.* BLISS.

Supreme Court, First District; Circuit, June, 1859.

LIABILITY OF TRUSTEES OF MANUFACTURING CORPORATIONS.

Under section 12 of the act to incorporate manufacturing and other corporations, the trustees who have neglected to report are not personally liable for debts contracted after they ceased to hold office as such.

Trial by the court.

The action was brought by the Shaler & Hall Quarry Company, to enforce the liability of the defendants, George Bliss and Charles Abernethy, as trustees of the Hudson River Stone Dressing Company, a corporation organized under the general manufacturing law of the State of New York, for acceptances, by said company, of the plaintiff's drafts dated respectively on the 20th and 27th days of April, 1854, for the respective sums of \$832.75, and \$1209.40, both payable to the order of plaintiff at three months after date, said drafts having been drawn against cargoes of Connecticut brown-stone sold and delivered by plaintiff to said company, between the 19th and 27th days of said April. The liability sought to be enforced was that imposed by the 12th section of the General Manufacturing Corporations Act of February 17, 1848. It was admitted by the pleadings that the annual report required by the 12th section was not filed or published within twenty days from the first day of January, 1854, nor until the 31st day of July, 1854. The evidence showed that no part of the stone furnished by plaintiff was delivered until after 18th April, 1854; and that the defendants ceased to be trustees of said company on that day, their term of office having previously expired, and an annual election having on that day taken place, at which their successors in office were duly elected.

There were other points taken in the case, upon which no opinion was expressed.

The cause was tried on the 9th of June, 1859, before Hon.

Cook *a.* Swift.

Josiah Sutherland, justice, without a jury, who rendered his decision, June 28, 1859, in favor of defendants; as follows:

H. & C. S. Andrews, for plaintiffs.

Charles F. Sandford, for defendants.

Per SUTHERLAND, J.—It appears from the evidence in this case, that the debt which the plaintiff seeks to recover in this action was not contracted, and did not accrue, until after the 18th of April, 1854, and that the defendants, Bliss and Abernethy, ceased to be trustees on that day. On that ground alone, I think the defendants Bliss and Abernethy must have judgment against the plaintiffs with costs. It is unnecessary to pass upon any other questions in the case.

COOK *a.* SWIFT.

Supreme Court, Eighth District; General Term, Nov., 1859.

JUSTICE'S COURT.—APPEAL.

On appeal from a justice's court under sections 353 and 366 of the Code, the appellate court must hear at the same time and pass upon all the questions, both those of error in law and of error in fact, and of a motion for a new trial. Where the appellate court refused to hear argument upon the whole case, at the same time requiring the appellant to argue his motion for a new trial before proceeding with the case, or lose the benefit of it, the Supreme Court reversed the judgment and left the cause pending upon the appeal in that court to be proceeded with anew.

Appeal from a judgment of the county court affirming a judgment of a justice's court.

The facts are fully stated in the opinion.

G. Parsons, for the appellant.

S. Caverno, for the respondents.

BY THE COURT.*—MARVIN, J.—The parties joined issue, and

* Present, GREENE, MARVIN, and DAVIS, JJ.

Cook & Swift.

the cause was adjourned. On the adjourned day the defendant did not appear; the plaintiff did appear and examined witnesses, and the justice rendered judgment in his favor. The defendant appealed to the county court, stating, as grounds, that the justice erred in calling the suit on the adjourned day, for the reason that the plaintiff did, after the cause was adjourned, in the presence of the court, withdraw the action; and at the same time gave notice to the defendant and his counsel of the same. Also, that the justice had no jurisdiction to render judgment against the defendant. The justice made a return of the proceedings in the action. The defendant procured several affidavits tending to prove a defence, and also that after the cause was adjourned, the plaintiff gave notice to the defendant that he had or should withdraw it, and that he, the defendant, should make no more costs. Copies of the affidavits were served upon the plaintiff, with notice that they would be used, &c. The plaintiff procured several affidavits, and others were made in behalf of the defendant in reply. The record contained all the affidavits.

The case came on for hearing in the county court, and the return and affidavits were read, and the counsel for the appellant was proceeding to argue the case upon the return of the justice, and also his application for a new trial founded upon the affidavits, when his attention was called to a rule of the court to the effect that, when the appeal is founded upon an error of fact, or a new trial is asked for, the same shall be heard upon the affidavits, &c., and be decided before the hearing upon the return of the justice. The counsel for the appellant claimed the right to be heard upon the return and the affidavits at the same time. The court refused to permit this, but would hear the application for a new trial, and decide it, before hearing the case upon the return. The counsel then stated that he wished to argue the appeal upon the return at that time, and proceeded in his argument upon the return. An order was entered, by direction of the court, "motion to set aside judgment and for a new trial herein; motion withdrawn and ordered that the defendant pay respondent \$5.00 costs for opposing, and thereupon cause is argued, submitted, and court take the papers." The counsel for the appellant insisted that the affidavits and appeal upon the return should be heard to-

Cook *a.* Swift.

gether, and the court should first consider the case upon its merits, &c. These facts are presented by stipulation. The county court affirmed the judgment upon the return of the justice, and has not passed upon the application for a new trial founded upon the affidavits.

We agree that the court decided correctly upon the justice's return, and it is not necessary here to state the question made upon that. But should not the court have decided all the questions before it?

By the Code (§ 353), the appellant is to serve notice of appeal, stating the grounds upon which the appeal is founded. Section 366 directs as to the judgment of the county court. The judgment of the justice may be reversed for error of law or fact. The question as to error in fact may be determined on affidavits, or, in the discretion of the court, upon the examination of witnesses. Thence comes the provision, that if the defendant failed to appear before the justice, and it is shown, by the affidavits served or otherwise, that manifest injustice had been done, and the defendant satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial, before the same or any other justice, at such time and place, and on such terms, as the court may deem proper.

The county court should have heard and should have passed upon all the errors alleged, whether of law or fact, and upon the application for a new trial. The only way provided by the Code for bringing before the court the errors, either of law or fact, is by appeal. And there must be an appeal when it is intended to make an application for a new trial. So I understand the Code. The provision relating to setting aside or suspending the judgment and ordering a new trial is contained in the section relating to judgment to be given "upon the hearing of the appeal" (§ 366).

There is but one appeal and but one hearing, and I suppose the appellant may avail himself of all the errors, whether of law or fact, prejudicial to his rights, and may also make the application for a new trial, under the circumstances specified in the Code.

If there is error in law or error in fact, the county court should reverse the judgment. If there is no error in law or

fact the judgment should be affirmed, unless there is an application, under the circumstances specified in the Code, for a new trial. If such application is made, the county court should pass upon the question, and, in its discretion, deny the application or grant it, &c. The judgment will be reversed upon some error of law or fact, or the judgment will be set aside or be suspended, and a new trial ordered, or, notwithstanding all the grounds alleged by the appellant, the judgment will be affirmed.

The mode of bringing errors of fact before the court is properly pointed out, I think, in *Hurd v. Beeman* (8 *How. Pr. R.*, 254), and I think the same practice applicable to this case.

In the present case the county court has not passed upon the question raised by the affidavits. The court has not exercised its discretion whether the judgment should be set aside, &c., and a new trial ordered. The court refused to hear and pass upon that question at the time it heard and passed upon the alleged error in law to be found in the return.

It is true that, by the rule entered, it is said that the motion was withdrawn—meaning the motion for the relief founded upon the affidavits; but the stipulation shows that the counsel for the appellant did not withdraw this part of his case, but insisted upon his right to be heard upon the whole case, and that the court should pass upon all the questions. The court refused to hear an argument upon the whole case, and directed the rule to be entered. I think the county court erred in not hearing the whole case, and I think this court should reverse the judgment, simply leaving the cause pending in the county court upon the appeal, and the county court should proceed to hear the case and pass upon all the questions.

Judgment accordingly.

Sands v. Craft.

SANDS v. CRAFT.

Supreme Court, Second District; General Term, December, 1859.

EXECUTORS AND ADMINISTRATORS.—COSTS.—CAUSE OF ACTION.

The liability of the estate of a deceased executor, for assets held by him as such at his death, is not a debt of the estate which can be referred under the provisions of the 2 Revised Statutes, 88, section 36.

The representatives of the deceased executor are bound to refuse to refer such a claim, and are not liable for costs by reason of refusal.

Appeal from an order on the report of a referee.

The action was brought against the defendants as executors of Isaac L. Craft deceased, who was a coexecutor with the plaintiffs of the will of Robert Sands. The object of the action was to adjust and recover the amount of assets held by the decedent at the time of his death, as such coexecutor. The referee awarded costs to the plaintiffs, on the ground that defendants had refused to refer the claim under the statute, and the defendants appealed.

E. D. Eldridge, for the appellants.

John Thompson, for the plaintiffs.

BY THE COURT.*—BROWN, J.—Isaac L. Craft, the defendants' testator, was not the debtor of the plaintiffs, or of the plaintiffs' testator in his lifetime, and at the time of his death. He was the coexecutor and trustee of the plaintiffs, in regard to the estate real and personal of David Sands, the plaintiffs' testator. He had been selected for this place of trust and confidence by David Sands himself, and, in connection with the plaintiffs, had taken into his hands the trust property, and proceeded to execute the trust. This was his precise position at the time he died, and his relation to the plaintiffs at the time was that of cotrustee, and not debtor. He owed to the *cestuis que trust*

* Present, BROWN, LOTT, and EMOTT, JJ.

and to his cotrustees a duty and obligation, and that was to apply the trust property to the uses of the will, and not to pay them a debt in the popular sense of the term, according to any promise of his, express or implied. He was responsible to the creditors, legatees, and next of kin, in the same manner and before the same tribunals as other executors, but not otherwise. He might have been cited before the surrogate, to render his accounts and for a distribution of the estate in his hands, and so he might have been impleaded upon the equity side of the court to account, and also for a distribution of the estate upon a bill filed; but not otherwise. He could not have been impleaded in a court of common law (except possibly by the old action of account), because none of the common-law forms of action were the appropriate remedy for that purpose. Before he could be required to pay over the trust property in his hands, his accounts were to be examined and adjusted, and all just allowance for disbursements and commissions were to be made to him, and if any portion of the estate in his hands consisted of securities for moneys invested in pursuance of any directions contained in the will, he would have been entitled to be credited with such investments, and the decree must also have provided for the disposition of such securities. In each of these proceedings he would have been entitled to take his costs out of the trust property, unless he was adjudged guilty of misconduct in the execution of the trust. These observations apply to executors generally, and not to the case of Isaac L. Craft in particular, because nothing appears upon the papers in this motion to show what the nature of the trust was. But they tend to show that his position at the time of his death was not that of debtor to the plaintiffs or their testator, in any sum of money for which the former had their action at the common law. His death did not change the nature and extent of his liability.

Section 44 of the act concerning the granting of letters testamentary* provides, among other things, that upon the death of one of several executors, the remaining executors shall proceed to complete the execution of the will according to law. Assuming that the surviving executors had the right to the as-

Sands a. Craft.

sets of the estate in the hands of their coexecutor at the time of his death, they certainly could not treat them as an ordinary debt, liquidated and ascertained, to be recovered by a common-law action. If this could not have been done against the deceased executor in his lifetime, for the reasons I have already given, how can it be done as against his personal representatives after his death? And if the claim was not the subject of a common-law action, it was not a claim which his representatives were bound to refer, under the 36th section of the act concerning the duties of executors and administrators, in the payment of debts and legacies.* Section 27 directs the executors and administrators to proceed with diligence to pay the debts of the deceased, and prescribes the order of payment. Section 34 provides for the publication of a notice, requiring all persons having claims against the deceased to exhibit the same with the vouchers to the executors by a given day. Section 35 provides that upon a claim being presented, the executors may require satisfactory vouchers in support thereof, and also the affidavit of the claimant that the same is justly due, that no payments have been made thereon, and that there are no offsets thereto within the knowledge of the claimant. Section 36 declares, that if the executor doubt the justice of the claim, he may enter into an agreement to refer the same to three referees, to be approved by the surrogate. And upon filing the same in the office of a clerk of the Supreme Court, or of a clerk of the Court of Common Pleas, a rule may be entered referring the claim to the referees so named. The court then becomes possessed of the cause, and the referees are to proceed in the same manner, and be subject to the same control, as if the reference had been made in an action in which such court might by law direct a reference. The court may confirm or set aside the report, and the judgment to be entered upon it shall be effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process. Section 38 puts a limitation upon the recovery of claims disputed or rejected, which shall not be prosecuted within six months after such dispute or rejection.

It will be seen, I think, that the provisions to which I have

* 2 Rev. Stat., 88, § 36.

referred, cannot be applied to the trust moneys or property in the hands of an executor at the time of his death. They contemplate an ordinary debt, for which the deceased was liable in his lifetime, upon a promise express or implied.* A debt which may be supported by the oath of the creditor, which is justly due, and which may be the subject of an offset. The claim must be of such a nature as was cognizable in the Supreme Court, or Court of Common Pleas, at the time the act took effect, and for which the common-law courts, as distinguished from the equity courts, afforded an adequate and complete remedy to both parties.

I have already said that the assets of an estate in the hands of an executor, unadministered at the time of the executor's death, may consist of money unexpended, of securities for money invested in the name of the executor pursuant to some direction in the will, or of property unconverted into money, or in process of being converted into money. For all this the surviving executor, if there be one, or the administrator *de bonis non*, if not, would have a just claim against the representatives of the deceased executor. But it is manifest that a reference under the 36th section of the act, with the usual judgment given by the course and practice of the courts of common law, would be an imperfect and inadequate remedy for the settlement and recovery of such a claim.

I am therefore of opinion, that the defendants in this action were not only not bound to enter into an agreement to refer the claim against their testator in this action, pursuant to the 36th section of the statute, but it was their duty to refuse to enter into such a reference, because the plaintiffs' claim was not referable, and there may have been many reasons to think that, in such a proceeding, the rights and interests they represented could not be effectually protected.

The referee made his award of costs dependent upon the obligation of the defendants to enter into the agreement to refer the claim, and, as I think it was not referable without an action, the order made at the special term, awarding costs to the plaintiffs, should be reversed.

Peckham *v.* Ketchum.

PECKHAM *v.* KETCHUM.*New York Superior Court, General Term, January, 1860.*

BROKER.—LIABILITY FOR GENUINENESS OF STOCK.

A broker who, being employed to purchase stock, in good faith and in accordance with the custom of the market, makes the purchase in his own name and transfers the stock bought to his principal, is not liable to the principal if the stock prove to be spurious.

This was an action to recover from the defendants the price paid by the plaintiff for what purported to be ten shares of the stock of the New York and New Haven Railroad Company.

The plaintiff employed the defendants as brokers to purchase for him ten shares of that stock.

The defendants purchased what was passing in the market as the genuine stock. It was transferred to them in their own name, on the books of the company, by the seller, and credited to them by the transfer agent. After this transfer, the plaintiff paid them the price of the stock, and their commission, and they paid the seller, and transferred the ten shares to the plaintiff. Afterwards it turned out that the seller had no title to ten shares of genuine stock, and that the ten which were transferred originated in the overissue by Schuyler.

The plaintiff contended that the defendants, by purchasing in their own names, had made the stock their own, and had become liable to him as if they were principals in the transaction.

Mr. Jenness, for the plaintiff.

Mr. Bangs, for defendants.

BY THE COURT.—HOFFMAN, J.—The plaintiff applied to the defendants to purchase from them ten shares of the stock in question. Being informed that they had none to sell, the plaintiff then distinctly employed them, as brokers, to purchase for him that amount of shares.

The contract between the plaintiff and defendants therefore was, that they were to buy the stock from some third party, for his account. He gave them the money to fulfil this contract, and they, in effect, paid that money to the seller of the stock.

The plaintiff dealt with the defendants as stock-brokers, and was bound by those customs which prevailed in relation to that species of business. (*Horton a. Morgan*, 6 *Duer*, 56; affirmed on appeal, 13 *N. Y. R.*, 170.) The court above say: "The practice of stock boards by which the brokers only, and not their customers, are known in their dealings with each other, was not unreasonable; and the plaintiff, by directing this purchase to be made, must be understood as consenting that it should be done in the usual manner." The case before us states, that in making such purchase and in causing or permitting the ten shares to be transferred to them, before calling upon plaintiff to pay, and in receiving said check from the plaintiff, Ketchum, Rogers & Bennet acted in the mode usual and customary among stock-brokers in the city of New York, among whom it was not usual or customary to disclose the names of their principals to persons with whom they dealt.

This is sufficient to establish a special custom, although it is in proof also, that some brokers make use of what is called "Purchase Notes," in which the purchaser's and seller's names are inserted.

This custom, then, of which the plaintiff is assumed to have had legal notice, puts him, I think, in the same position as in case of a contract made distinctly with one as agent of a known or disclosed principal. (*Rathbone a. Budlong*, 15 *Johns.*, 1; *Mauri a. Heffernan*, 13 *Ib.*, 57; *Exparte Haiti Rep.*, 12 *Ves.*, 352; *Lewis a. Nicholson*, 18 *Queen's Bench R.*, 503.)

The leading case of *Westropp a. Solomon* (8 *Common Bench R.*, 343), cited by the plaintiff's counsel, appears to me hostile to his claim. The plaintiffs were brokers, and were employed by the defendant to sell certain scrip, which turned out to be invalid. The certificates were such as to deceive everybody who dealt with them. There was no fraud or negligence on either side. Still they were invalid. The brokers paid the purchase money back to the vendees, as also a certain sum which, under the rules of the Stock Exchange, had been prescribed to be paid on purchases. They then sued their principal, who paid

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into court the purchase-money, but contested as to the additional sum. The defence was sustained.

The court say: "It seems to be agreed that where a principal employs an agent, the former is bound to indemnify the latter in respect of all payments which may be made by him in the due course of his employment. The agent may recover moneys so paid under a special account stating a promise to indemnify, or under account of money paid. The vendees were entitled to recover back the money paid for the stock.

I do not think that the employment of the defendants in this case can justly be treated as an employment to purchase genuine stock to the extent and import of making them guarantors of the validity of that which they should purchase. It was merely to purchase what in the market was passing as stock of this description. (*Lamert a. Heath*, 15 *M. & W.*, 486.) Then the rule of indemnity to the agent, when the principal is a seller, involves the exemption from responsibility of the agent when, under similar circumstances, the principal is the purchaser. Again, an agent employed to purchase a commodity of a particular character or quality is bound to use all the circumspection and diligence which a prudent purchaser himself would exercise. The nature of the article, the opportunity of detecting the defect or inferiority with proper diligence, are elements in every case of this description. (*Mainwaring a. Brandon*, 6 *Taunton*, 202; *Van Allen a. Vanderpool*, 6 *Johns.*, 69; *Liotard a. Graves*, 3 *Caines' R.*, 226.

Judgment for defendant with costs.

BLUNT *a.* MOTT.

New York Common Pleas; Special Term, February, 1860.

CAUSE OF ACTION.—USURPING PUBLIC MEETING.

The plaintiff hired a room for holding a public meeting, and paid for its use, and the defendants, with the design of preventing the meeting, took possession of the room and passed resolutions opposed to the object of the call, in conse-

Blunt *v.* Mott.

quence of which the plaintiff and his associates were unable to hold the meeting proposed.

Held, that the plaintiff might recover from defendants the expenses which he had incurred in preparation for the meeting.

Demurrer to complaint.

This was an action against the defendants for disturbing a public meeting, or for preventing a public meeting from being held. It was alleged in the complaint, that on the 16th of February, 1857, Messrs. Blunt, Daniel Lord, W. F. Havemeyer, Peter Cooper, Joseph Hoxie, D. F. Tiemann, and a number of other well-known citizens, issued a call for a public meeting of all citizens who were opposed to legislative grants of railroad franchises and privileges in this city, said meeting to be holden on the 25th of the same month at the Cooper Institute.

The complaint further stated that the defendants and others arrived at the Cooper Institute first, and usurped the functions of the proposed meeting; that the defendant Kerrigan nominated the defendant Mott for chairman; that he thereupon was called to the chair, which he occupied, and that resolutions were passed entirely opposed to the objects and purposes for which the meeting was called; that in consequence thereof the plaintiff and his friends were prevented from the concerted action they proposed, and accordingly were compelled to lose the rent and other disbursements which they had paid and made, amounting in all to \$120, for which judgment was asked.

The defendants demurred to this complaint, on the ground that it did not show a cause of action. The grounds taken were, first, that plaintiff could not complain that the right sort of resolutions were not passed; and, second, that the complaint did not show that himself and friends were prevented from using the room at 7½ o'clock, the hour the meeting was called.

G. Tillotson, for the plaintiff.

Mott, Murray & Harris, for the defendants.

BRADY, J.—The defendants admit by the demurrer that the plaintiff hired the room described for the purpose stated in the complaint, and paid for its use; that he also published notices

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of the meeting, and paid for such publication; that with the design of preventing the meeting from being held, they took forcible possession of the room, and passed resolutions opposed to the objects of the meeting contemplated by the plaintiff's call; and that, in consequence of their acts, the plaintiff and associates were unable to hold the meeting for which the room had been hired and the call published. On these facts, it seems to me that the plaintiff is clearly entitled to recover. He had a right, individually, or in conjunction with others, to call a meeting at the time and in the place named; and having that right, it was unlawful in the defendants to interfere with him—which they acknowledge they did designedly. The plaintiff paid for the use of the room for the purpose of uniting with others in the condemnation of a policy to which he was opposed, and in the exercise of such a right he was entitled to protection from force or violence. The defendants had a similar right to express their approbation of the policy which he condemned, but not in the manner in which it was done in this instance. If the defendants had waited until the hour named for the meeting, and then participating in the proceedings thereof had discussed the question, and carried by motion or resolution any particular scheme, there might be some difficulty in determining whether that was such an interference with the plaintiff's rights as would create a cause of action; but no such question is presented, and I think the demurrer does not involve the points submitted on the argument. The plaintiff having paid \$120 for the privilege of uniting with others in the expression of certain views of a public measure, which was his right, and having been deprived of the opportunity by the design of the defendants, should be reimbursed, and is entitled to recover.

Judgment for the plaintiff, with liberty to the defendants to answer in twenty days, on payment of the costs of the demurrer.

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PEOPLE *a.* BARRY.*Supreme Court, First District; General Term, February, 1860.*

CRIMINAL LAW.—WRIT OF ERROR.

An order quashing a conviction and sentence is not a judgment upon an indictment which can be reviewed on a writ of error under the act of 1852. (*Laws of 1852, 76, ch. 82.*)

Writ of error to the General Sessions.

The prisoner was, on the 21st of May, 1858, indicted for assault, with intent to kill, upon one Philip Wolfe, and also for a robbery committed, as averred in a second indictment, on the same day, in stealing over \$100, by violence, from the person of Philip Wolfe. To the first indictment the defendant pleaded guilty of an assault and battery, and was sentenced to four months' imprisonment on October 23, 1858. On November 5, 1858, a notice was given of a motion for a new trial, and on November 15, 1859, an order was made in the General Sessions, by Russell, City Judge, that the conviction and the sentence upon conviction be quashed, and that the order of imprisonment be revoked, "said indictment having been on the same day" (*i. e.*, the day of its finding), "by operation of the statute, superseded and quashed by the filing of another indictment for the same matter, although charged as robbery."

From this order of City Judge Russell the People appealed to the General Term of the Supreme Court by a writ of error.

N. J. Waterbury, District-Attorney, for the appellants.—
I. The section of the statute referred to (3 *Rev. Stat.*, 5th ed., 1018, marg. p. 726, § 42), reads: "If there be at the time pending against the same defendant two indictments for the same offence, or two indictments for the same matter, though charged as different offences, the indictment first found shall be deemed to be superseded by such second indictment, and shall be quashed." The case involves only elementary principles.

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As a matter of practice, the motion to quash cannot be entertained after plea, impannelling of jury, giving of evidence, and conviction, and it is decided that under the last above statute, a motion must be made before such indictment will be quashed.

II. The indictments presented different offences and different matters severally, unless a grand larceny is the felonious assault by one person upon another.

Brown, Hall & Vanderpoel, for the respondent, moved to quash the writ.

BY THE COURT.*—SUTHERLAND, J.—The order of the City Judge on November 15, 1858, quashing the previous conviction of the defendant Barry, and his sentence on such conviction, by the Recorder, on October 23, 1858, and revoking and annulling the Recorder's order of imprisonment, was not a judgment upon the indictment, but was, or purported to be, an order quashing and annulling the previous proceedings before and by the Recorder in this case.

The act of 1852 allowing writs of error to be brought in behalf of the People in certain cases, allows such writ, "to review any judgment rendered in favor of any defendant upon any indictment," &c.

The order or proceeding of the City Judge of November 15, so far from being a judgment rendered upon the indictment, was an order or proceeding annulling and destroying, or undertaking to annul and destroy a previous judgment rendered upon the indictment.

Therefore it is clear, however unauthorized or erroneous the order of the City Judge on November 15th may have been, that such order cannot be reviewed, or such error corrected by writ of error under the act of 1852, and that the motion made by defendant to quash the writ of error in this case must be granted.

BONNEY, J.—In the Court of Sessions, on the 21st May, 1858, the indictment was found against Richard Barry, for assault and battery with intent to kill. On the same day, at a later hour, an indictment for robbery in the first degree, was found against the same person, for the same act or matter for which the first

* Present, SUTHERLAND, BONNEY, and ALLEN, JJ.

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indictment was found. On the 4th October, 1858, Barry was arraigned on the indictment first found, and then pleaded guilty of assault and battery; and upon that plea was, on 23d October, 1858, sentenced to imprisonment in the penitentiary for the term of four months. On the 5th November, 1858, a motion was made in Sessions, on the said indictments and other papers, for a new trial, on the ground of irregularity in the proceedings, and on the merits; and on 15th November, 1858, that court ordered that said conviction and sentence be quashed, and the order of imprisonment to the Sheriff thereon be revoked and annulled, "for the irregularity of taking the same on the indictment found May 21, 1858, against the said Richard Barry, charging him with an assault and battery, with intent to kill one Philip Wolfe, said indictment having been on the same day, by operation of the statute, superseded and quashed by the filing of another indictment for the same matter, although charged as the offence of robbery." This last order of Sessions is now brought before this court, by writ of error, for review.

The counsel for Barry move to quash the writ of error as unauthorized by law. In the case of *The People v. Corning* (2 *Comst.*, 9), decided in December, 1848, the Court of Appeals dismissed the writ of error on the ground that writ of error to that court would not then lie in behalf of the People after judgment for the defendant in a criminal case; and, in the opinion in that case, Judge Bronson also expresses the opinion that the writ in behalf of the People would not be from the Sessions to Supreme Court. By the act of 22d March, 1852 (*Laws of 1852*, 76, ch. 82), it is enacted that "writs of error to review any judgment rendered, in favor of any defendant, upon any indictment for a criminal offence (except after acquittal by a jury), may be brought in behalf of the People," &c., on being allowed by a Justice of the Supreme Court. In this case, the judgment of the court below was rendered on 23d October, 1858, on conviction by confession, that Barry be imprisoned in the penitentiary four months. Afterwards it was, by the Court of Sessions, on motion, ordered that said conviction and sentence be quashed for irregularity, &c. In my opinion, this order or decision of the Court of Sessions, on motion, was not a judgment rendered upon the indictment, within the meaning and intent of the act of 1852. The motion to quash the writ of error should consequently be granted.

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The order of the Court of Sessions sought to be reviewed, was by that court founded on 2 Rev. Stat., 726, § 42, which is in the following words: "If there be, at any term, pending against the same defendant, two indictments for the same offence, or two indictments for the same matter, although charged as different offences, the indictment first found shall be deemed to be superseded by such second indictment, and shall be quashed."

In this case, two indictments for the same matter, but charged as different offences, were on the same day (21st May, 1858), found against the defendant.

Afterwards, on the 4th October, 1858, on being arraigned in the first indictment, which was for the minor offence, by leave of the court and consent of the district-attorney, he pleaded guilty of an offence less than that charged, and, on that conviction by confession, sentence was pronounced on 23d October, 1858.

The statute is clear and positive, and there can be no question that, on the finding of the second indictment, the defendant was entitled to have the first indictment quashed. But the statute does not say that the first indictment shall, on the finding of the second, become void, so that no trial or conviction thereupon can afterwards be had by confession, or otherwise. Some action by the court, on motion, in behalf of the accused, or otherwise, to put that indictment out of the way, was evidently intended, and an order of the court was necessary to quash it.

From the case as it now appears, it is a legitimate conclusion that this defendant preferred a conviction by confession, on the indictment for the minor offence, in its mitigated form, to the hazard of a conviction by the jury, on trial of the indictment for the greater offence, and acted accordingly.

In my opinion, it was competent for him to waive the provision of the statute in his favor, and I think he has clearly and advisedly done so; and that after his confession, he had no right to claim the benefit of the statute which he had so waived. The cases of the People *a.* Monroe (Oyer and Terminer, 20 *Wend.*, 108), is direct authority on this point. If, however, I am right in the conclusion first stated, we have no power to correct the error committed by the court below.

Young *a.* The New York and Liverpool Steamship Company.

*affirmed
15 Feb. 69.*

YOUNG *a.* THE NEW YORK AND LIVERPOOL
STEAMSHIP COMPANY.

Supreme Court, First District; Special Term, March, 1860.

PLEADING.—COMPLAINT TO CHARGE STOCKHOLDERS OF CORPO-
RATION.

In an act to charge stockholders personally with debts of their corporation, under a charter which provides that the stockholders shall be liable, etc., until the amount of capital stock has been paid in, the complaint must show that defendants were stockholders during the time the debts sued on were incurred.*

Judgment-creditors of the corporation are not proper parties defendant in such an action, without showing why they were not made parties plaintiff.

Demurrer to the complaint.

HOGEBOOM, J.—This suit is brought by the plaintiffs, as judgment-creditors of a corporation styled the New York and Liverpool United States Mail Steamship Company, to obtain satisfaction of their judgment out of the individual property of certain stockholders of said company, who are made parties defendant therein. Other judgment-creditors of the Steamship Company are also made parties defendant, as well as the corporation itself. Certain of the defendants, who are alleged stockholders in the corporation, demur to the bill on various grounds, but principally upon the ground that the facts stated in the complaint do not constitute a cause of action. One of the judgment-creditors, to wit, the New York Balance Dock Company, also demurs to the complaint for the same reasons, and also because it should not have been made a party defendant, but if brought into the suit at all, should have been introduced as a party plaintiff. The action is commenced, as stated in the complaint, in behalf of the plaintiffs and such creditors of the Steamship Company as might choose to participate therein.

The action is understood to have been instituted under the provisions of the act of the Legislature of New York passed

* Compare Quarry Company *a.* Bliss, *Ante*, 211.

Young *a.* The New York and Liverpool Steamship Company.

April 11th, 1849, incorporating the New York and Liverpool United States Mail Steamship Company, and particularly under the provisions of the 11th section thereof, by which it is declared, that "the stockholders of said corporation shall be severally individually liable to the creditors of said corporation to an amount equal to the amount of stock held by them respectively for all debts and contracts made by said corporation, until the amount of capital stock of said corporation shall have been paid in, and a certificate thereof shall have been made and recorded, as prescribed in the following section." The allegations in the complaint are probably sufficient to show that the whole amount of the capital stock has not been paid in, and a certificate thereof has not been made and recorded, as required by the act.

But the complaint fails to show that the persons sued as stockholders, and attempted to be made individually liable to the creditors of the corporation, were such stockholders at the time the plaintiff's debt was contracted, and this, I think, is necessary to be done. It can scarcely be deemed to have been within the intention of the Legislature that this severe liability, unusual to members of a corporation, should be incurred, except by those who were members of the company during the time that the debts occurred, and over which debts, and the contracting thereof, they may be presumed to have had some control through their agents, the directors of the corporation. At any rate, such I understand to have been the practical construction of a similar provision in the charter of the *Rossie Galena Company*, in the case of *Judson a. R. G. Co.* (9 *Paige*, 598; *Moss a. Oakley*, 2 *Hill*, 265; *Adderley a. Storm*, 6 *Hill*, 625.) I must, therefore, regard the point as settled upon authority.

The allegations of the complaint on this subject are, that the plaintiff's debt arose during the years 1856 and 1857; that the said corporation did business in New York in the years 1856, 1857, and 1858; that some time in 1858 it discontinued its business; that all its property was sold, and that the said corporation suspended business, owing sundry debts which still remain unpaid; and "that when the said corporation suspended business, in the year 1858, the stockholders in said corporation consisted of the following persons" (naming them). I regard these allegations as insufficient upon their face to show, either expressly or presumptively, that the defendants were stockhold-

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ers during the time the plaintiffs' debt was contracted, was accruing, or had matured, which is expressly averred to be during the years 1856 and 1857.

The defendants further claim, under the peculiar phraseology of this act, that the stockholders shall be "*severally* individually liable," that it is virtually a legislative declaration, that they shall not be prosecuted *jointly*, as in the present instance.

The 13th section of the act provides that the personal liability of the stockholders shall not attach unless the debt be payable within one year from the time it is contracted, and be prosecuted against the corporation within one year after it shall have become due. And the defendants further insist, inasmuch as the complaint does not expressly show *when* the debt *matured*, and only that it was owing, due, and payable on the 1st of November, 1857, and was prosecuted on the 10th of February, 1858; that it may have *become due* more than a year prior to the last-mentioned date, and that, therefore, the plaintiffs do not show themselves in a situation to enforce the personal-liability provisions of the charter.

Some other objections were taken by the defendants, who are sued as stockholders, to the sufficiency of the complaint, but I have not thought it necessary to pass upon them decisively, being of opinion that the point first considered presents a fatal objection to the complaint in its present shape. Nor have I thought it necessary to consider at length whether the action was maintainable under the provisions of the Revised Statutes, entitled "Of proceedings against Corporations in Equity" (2 *Rev. Stat.*, 461,) as it is evident that this action is framed upon the theory of enforcing the personal liability of the stockholders under the charter, and not upon the theory of dissolving the corporation, or sequestrating its property for the payment of defendants' debts. And this I understand to be conceded by the plaintiffs.

The New York Balance Dock Company is made a party defendant as one of the judgment-creditors of the corporation, and takes the additional objection to the complaint that it shows no cause of action against that company, and no reason for making it a defendant.

The plaintiffs allege in their complaint that they cannot state what amount is due upon the judgments against the corporation, or which of them embrace claims against the stockholders per-

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sonally, but are informed and believed that some of them embrace such claims, and pray that an account may be taken of all the debts which are entitled to be enforced against the stockholders personally, and that until such account be taken, the stockholders may be restrained from paying to any creditor any of the debts. They further pray judgment and satisfaction for the plaintiffs' debt, and that the stockholders pay into court such sums as they are liable for, and the like relief for any creditor of the corporation who is entitled to participate in the moneys thus raised.

I do not think these allegations in the complaint, furnish a sufficient reason for making the N. Y. B. D. Co. a party defendant. The allegations of ignorance of the amount and character of the claims entering into the judgments, cannot be a reason for making the judgment-creditors parties. The action seems to be in some respects founded upon the authority of the case of *Bogardus v. The Rosendale Manufacturing Company* (3 *Seld.*, 147). That case, although it is not expressly so stated, it is evident, was a case arising before the Code. A suit can no longer be necessary for obtaining a discovery—at any rate, except in cases where some exception to the general rule, prevailing under the Code prevents the examination of parties—or the officers or agents of a corporation. The prayer for an injunction, independent of the objection that it is not asked against the judgment-creditors, ought not to be granted. (*Judson v. Rossie Galena Company*, 9 *Paige*, 598.) The prayer for an account of all the debts of the corporation ought also not to be granted, as it is unnecessary to enable the plaintiff to obtain his required relief under the charter, as it will involve unnecessary delay, and as it will, probably, result in the disclosure of claims, some of which cannot be enforced against some of the defendants in this suit. (9 *Paige*, 598.) There seems, therefore, to have been no necessity for making these judgment-creditors parties. If the plaintiffs are right in commencing the action as well for the benefit of others similarly situated as for their own benefit, there was no necessity, by any act of the plaintiffs, for putting such persons in the condition of actual parties without their consent; and if they were proper, or necessary parties plaintiff, the plaintiffs cannot make such persons parties defendant, without an averment in the complaint that the plaintiffs had ineffec-

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tually attempted to obtain their consent to unite as plaintiffs in the action, or some other similar or sufficient averment. (*Code*, § 119.) The complaint, therefore, seems to be demurrable as to the New York Balance Dock Company, as well as to the other defendants who have been heard upon demurrer.

There must be judgment for the defendants on the demurrer with costs, with leave to the plaintiffs to amend on payment of costs. And on payment of such costs the plaintiffs may, if they so elect, discontinue this action as against the demurring defendants, and without prejudice to an application to the court to discontinue the action as to the other defendants without costs, if the plaintiffs shall be so advised.

PEOPLE *on rel.* McSPEDON *a.* THE BOARD OF
SUPERVISORS.

affirmed
Mabb. 1141
21 Nov. 288.

Supreme Court, First District; Special Term, November, 1859.

MANDAMUS.—RETURN.—OFFICIAL CERTIFICATE.

The allegations in a return to an alternative writ of mandamus, seeking to take advantage of technical objections, must distinctly allege such objections. They will be disregarded if left to be drawn as matter of inference.

Where the certificate of a board or body is required as the foundation of a claim, the certificate of a majority of them, at a duly convened meeting, is sufficient.

If the relator is not entitled to what he demands in the alternative writ, his motion for a peremptory writ should be denied, although it appear that he is entitled to a portion of the relief. The peremptory writ must follow the alternative.

Motion for peremptory writ of mandamus upon the return to an alternative writ; and motion to strike out parts of the return.

The alternative writ alleged that the relators entered into a contract with the Commissioners of Records, a board created by the act of April 13, 1855, by which the relators were to prepare and print indexes to the records of the county, payment to be made by the chamberlain of the city as the work progressed, upon the certificates of the commissioners; that they had com-

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pleted portions of the work entitling them to payment of \$47,131.97, and had "in due form of law, obtained and now have in their possession certificates" therefor, and that the chamberlain had refused to pay the same, for the reason that there were no moneys in his hands applicable thereto, and that the supervisors had refused or neglected to raise by tax or otherwise the necessary sums, and that the sum of \$193,820.26 was necessary to be raised to perform and complete the contract. The relief demanded was that they raise the latter sum, or show cause, &c.

The return, after denying, generally, that the relators had ever in due form of law obtained, or that they had at the time of issuing the writ, possession of the certificates required, went on to allege that one Miner was register of the city and county, and by the act creating the board, was *ex officio* one of the commissioners; that all the work now in question was done in respect to the records in his office; and that the certificates mentioned in the writ were never signed by him.

The other portions of the return, so far as material to the opinion, will appear below.

J. W. Edmonds and *J. T. Brady*, for the relators.—I. Our first objection is the averments that Miner did not sign the certificates. A majority did sign, that is all that is required. (2 *Rev. Stat.*, 555.) It is nowhere averred that a majority did not sign; but only that one did not. It is not averred that all did not meet. The intendment is most strongly against the pleader. The return is argumentative. It is insufficient. All the substantial allegations of the writ are not answered; the return is evasive. When such objections appear, the relator must not plead, because he then admits the sufficiency of the return; he must not demur, because he then admits the facts; he cannot demur specially; his only remedy is by motion for a peremptory writ, or to strike out of the return. (*Vail ads. The People*, 1 *Wend.*, 38; *People a. N. Y. Com. Pl.*, 9 *Wend.*, 429; *People a. Finger*, 24 *Barb.*, 341; *Com. a. Justices*, 2 *Virg. Cas.*, 9.)

II. As to the \$193,000 in the seventh paragraph, it is evasive. It is nowhere averred that that amount of work has been done, but it is averred that that amount is necessary to complete the contract. That averment is not answered, and the answer as to the \$193,000 is evasive and immaterial.

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III. As to having passed the tax-lists. As to corporation, the office of a mandamus is not only to set them agoing, but direct the manner of their going. This is a duty on and not discretionary with the defendants. Though the period of levying it for this year has passed, that is no objection.

IV. The great point involved is not answered, namely: that we have a contract; are performing it; have earned money in such performance, which is unpaid; that the performance is going on, and more will be earned; and that defendants have refused to raise any thing to pay, either for work done or to be done.

V. The Board of Supervisors have ratified the contract, and it is now too late to dispute it. (People *a.* Powell, before Lorr, J., *MS.*)

VI. The return is signed by only one of the board. We have a right to the signature of all; that against all we may have our action for false return.

A. R. Lawrence, Jr., for the respondents.—This motion is of a fourfold character: I. To quash the return, on the ground that it does not show any legal cause for not complying with the alternative writ, &c.

II. That a peremptory mandamus issue, notwithstanding such return.

III. That the respondents be compelled to elect, between the first and second, and the third, fourth, fifth, and sixth paragraphs of the return, and that one or the other of such divisions of paragraphs be stricken out.

IV. That in the event of the first and second, or either of the specified paragraphs not being stricken out, and a peremptory mandamus refused, that relators have leave to demur or take issue on return, and that the issue formed be heard forthwith.

These points will be considered in their order, after taking a preliminary objection, which the respondents deem fatal to this motion.

Preliminary Objection.—The time to demur or plead to the return expired on the thirty-first of October, 1859, and it is therefore too late for the relators to move to quash the return, or to compel the respondents to elect between the paragraphs specified in the notice, or to ask for further time to plead or demur.

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1. The rule of the court requires a party either to plead or demur within twenty days after service of notice so to do, and provides that if no plea or demurrer to such return be interposed within that time, either party may notice the matter for a hearing, &c., and the same shall be heard and disposed of on the said return (*Rule 51*, 1858); and by neglecting to plead or demur, the facts alleged in the return are admitted to be true, and the case will be determined by the court the same as if the relators had formally demurred. (People *a.* Com. of Highways, 7 *Wend.*, 475; People *a.* Cayuga Com. Pl., 10 *Ib.*, 632; People *a.* Beebe, 1 *Barb.*, S. C. R., 379, 384.) Of course, as the facts are admitted to be true, the allegations setting them up cannot be stricken out of the return.

2. There is no rule of the court, nor any practice, which allows a party to move to quash and strike out portions of a return, and yet reserve to himself the right to plead or formally demur, in case such motion is decided against him, unless such motion be made within the twenty days specified in rule 51, above cited.

If the court does not coincide with the respondents, in the above preliminary objection, there are the following reasons why the motion should be denied:

I. A return to a writ of mandamus will not be quashed, unless it is clearly defective upon its face. (2 *Burrill's Pr.*, 178, 179; *Tapping on Mand.*, vol. 60, *Law Lib.*, new series, 412, 413, marg., 372, 373, and cases cited.) Unless, therefore, the court can see that in no aspect can the matters set forth in the return be a defence to the writ, the motion must be denied. The rule is not to intend any thing against the return. (2 *Selwyn's N. P.*, 834, p. 1111, Am. ed., 1839; *Rex a. Mayor of Lyme Regis, Douglas*, 157; *Stephens' Nisi Prius*, 2326.)

II. The motion to quash admits the facts stated in the return, and the court can only consider whether the matters of fact returned are a sufficient answer or not to the mandamus. (*Tapping on Mand.*, vol. 60, *Law Lib.*, new series, 412, 413, marg., 372, 373, and cases cited.) The inquiry then is, are the facts stated in the return a sufficient answer to the writ?

The return presents three general defences, which, for convenience' sake, have been divided into paragraphs.

1. That the certificates set forth in the mandamus are not in conformity with the requirements of the law under which the

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Commissioners of Record are acting, and it sets forth the facts supposed to show the defects in the certificates.

2. A denial that the amount specified in the writ has been expended by the commissioners, or that such expense has been incurred, or that the said amount is due to the relators, &c., or that the work has been performed by relators, &c.

3. That the tax-levy has been regularly confirmed, &c., and a large proportion of the taxes for the year 1859 collected.

Neither of these defences or answers can be called insufficient, on the ground of immateriality.

1. If there is a defect in the certificates, the respondents are not entitled to be paid, under the law of 1855. (See *Laws of 1855*, 753.)

2. If the amount claimed in the writ has not been expended by commissioners, or has not been earned by relators, of course they are entitled to no relief.

3. The fact that a large proportion of the taxes for the year 1859 has been collected, appeals very strongly to the discretion of the court in regard to granting a peremptory mandamus, even if it should be satisfied that the other answers are of no avail. The writ of mandamus is a prerogative writ, and the court will exercise a discretion as well in refusing as in granting it. (Ex parte Fleming, per Cowen, J., 4 *Hill*, 581; Van Rensselaer a. Sheriff of Albany, 1 *Cow.*, 502; 2 *Burrill's Pr.*, 76; People a. Canal Board, 13 *Barb.*, 432; People a. Supervisors of Westchester, 15 *Ib.*, 607; S. C., 12 *Ib.*, 452.) It cannot, therefore, be said that the facts stated in the return are immaterial. Neither can it be contended that the facts stated are insufficient on the ground of inconsistency. The rule of law is, that "wherever there is a mandamus directed to a party to do some act, or return some cause to the contrary, it is competent to that person to return as many causes to the whole of the writ, or to distinct portions of it, as he pleases, provided they are not inconsistent with each other." (*Tapping on Mandamus*, vol. 60, *Law Lib.*, N. S., 401, marginal, 360; Regina a. Mayor of Norwich, 2 *Salkeld*, 436; Wright a. Fawcett, 4 *Burr.*, 2041; Rex a. Church-wardens, Taunton, St. James, *Cowper*, 413—a return very much like this; Green a. Mayor of Durham, 1 *Burr.*, 127; Rex a. Mayor of York, 5 *Term R.*, 67, 68; Rex a. Manor of Old Hall, 10 *A. & E.*, 248; Rex a. North Midland

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Railway, 11 *Ib.*, 955; *Rex a.* Mayor of New Hudson, 7 *Q. B.*, 917; *Stephens' Nisi Prius*, 2326, tit. "Mandamus.") The first, second, third, fourth, fifth, and sixth paragraphs are direct denials of the allegations in the writ relative to the certificates alleged to be in the possession of the relators. (See *Writ*, folios 76 to 80, also folios 81 to 101.) The seventh allegation denies the expenditure of the amount claimed in the writ, and that the same has been incurred; also that the work has been done by relators or that the amount is due to them. The remaining allegations show the passage of the tax-levy and the payment of a large proportion of the tax for 1859. Nor are these defences repugnant or contradictory. The motion to quash cannot then be granted upon any of the principles laid down in the books as applicable to such a motion. (*Tapping on Mandamus*, 402; vol. 60, *Law Lib.*, N. S., marginal, 361.)

III. If the grounds taken in the first and second points are correct, the motion of the relators for a peremptory mandamus, notwithstanding the return, must be denied. Where a return is *prima facie* sufficient, so that a motion to quash will not be granted, a peremptory mandamus will not be awarded upon a mere motion, but the relator will be put to his demurrer (*Tapping on Mandamus*, vol. 60, *Law Lib.*, N. S., 412, 418, marg., 372, 373); and rule 51 of this court contemplates that a relator shall, if he does not succeed in quashing the return, or does not plead or demur thereto, formally notice the cause for a hearing, so that a final argument can be had upon the writ and the return. It does not allow the relator to couple such a notice of hearing with a notice of motion to quash the return.

IV. The respondents cannot be compelled to elect between the first and second, and the third, fourth, fifth, and sixth paragraphs of their return.

Each and all of those paragraphs distinctly refer to the same defence, to wit: the insufficiency of the certificates alleged to be in the possession of the relator. The first and second paragraphs are but matter of inducement to the third, fourth, fifth, and sixth paragraphs.

The first and second paragraphs cannot be objected to as stating matter of law, for these reasons:

1. An averment in a return that an act was not done in due form of law, has frequently been decided to be good. (*Rex a.*

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Church-wardens, Taunton, St. James, *Cowper*, 413; *Wright a. Fawcett*, 4 *Burr.*, 2040.) In the first of these cases the return was that a party "was not duly elected sexton according to ancient custom," &c. It was held good. In the second case the alternative writ set forth that Wright, the relator, was duly elected a freeman of the borough of Morpeth, and that thereby he became lawfully entitled to be sworn and admitted, &c., by the stewards. The return by the steward was, among other things, that Wright was not duly elected, &c. Lord Mansfield delivered the opinion of the court sustaining the return. In the case before the court the writ avers that the relators have "in due form of law obtained, and now have in their possession the certificates of the said commissioners," &c. To this the respondents reply that the relators have not, in due form of law, obtained, &c. Now where is the difference between averring that a party "was not duly elected," and that "he had not, in due form of law, obtained," &c. If the one averment is good, the other is good also, and we have the authority of Lord Mansfield for saying that the former averment is a good one.

2. Nor can it be contended that there is duplicity in the paragraphs specified in the notice, for if there be duplicity in the return, there is duplicity in the writ also, as the return follows the allegation in the writ. (See *Wright a. Fawcett*, 2 *Burr.*, 2041—remarks of Lord Mansfield; and see *Tapping on Mandamus*, vol. 60, *Law Lib.*, N. S., 402, 403, marginal, 361.) And it will be recollected that the rules of pleading, under the Code, do not apply in the writ of mandamus. (*Code*, § 47; *People on rel. Dinsmore a. Croton Aqueduct Board*, 5 *Abbotts' Pr. R.*, 373.) The rules of pleading in force before the adoption of the Code are, therefore, applicable to this case (and see *Tapp. on Mand.*, vol. 60, *Law Lib.*, N. S., 356, marginal, 309). The old rule, therefore, applies, that "if a pleading be bad, judgment shall be given against him who made the first default." (*Mansell on Demurrer*, vol. 10, *Law Lib.*, N. S., 60, marginal paging, 90.) And upon a motion to quash the return the respondent may attack the writ and impeach its validity. (*Clark a. Leicestershire Canal*, 6 *Queen's Bench*, 898; and see particularly *The Commercial Bank of Albany a. The Canal Commissioners*, 10 *Wend.*, 31.)

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V. If the court are with the respondents upon the foregoing points, it is respectfully submitted that there are no reasons why the relators should be allowed to plead or demur to the return, nor why the case should be heard forthwith in case they are allowed to plead or demur. They have had the notice served upon them which the rules of the court require; they have had twenty days in which to come to a determination whether they would attack the return as defective, on a motion to quash, or whether they would admit the fact by demurring, or deny them by pleading; they have chosen to make a motion to quash. The rule says, that if the relators do not plead or demur within the twenty days, the case must be heard upon the return and writ. That is the penalty that the relators must pay for not pleading or demurring in the first instance. Besides, the relators can raise all legal questions upon the argument on the writ and return. This case is one of such importance, that it should not be turned off with a hasty hearing on a motion. It should take its place upon the regular special-term calendar, and be heard as a calendar cause.

As to the defects in the alternative writ, and its failure to show any ground for relief to the relators, the counsel for the respondents argued the following *Additional Points*.

I. The certificates set forth in the writ are fatally defective. 1. The act of 1855, creating the commissioners of records, provides that the "said clerk, register, and surrogate, shall be *ex officio* commissioners in reference to their respective offices." It then declares that "the said commissioners shall receive no compensation for their services;" and further, that "the necessary expenses incurred by them shall be paid by the county treasurer, upon the certificate of said commissioners; and the supervisors of said city and county are hereby authorized to raise by tax the amount required to defray the same." (*Laws of 1855*, 763.) It is obvious that the words "said commissioners," used in referring to the certificate, embrace all the commissioners having, by the act, any power over or cognizance of the expense incurred in reference to either of the three offices mentioned in the act. Where, therefore, any expense has been incurred in reference to the office of register, it must be certified to by such register, he being as fully a commissioner in relation thereto as either of the four persons

designated in the act by name. None of the certificates set forth in the writ were signed by the register. 2. It is a condition precedent to the right of the relators to relief, that they should show that they have received the certificates in the form and manner provided by the act. (Smith a. Briggs, 3 Den., 73; Adams a. Mayor, 4 Duer, 295; and see Butler a. Tucker, 24 Wend., 449; Mokely a. Riggs, 19 Johns., 71; Carpenter a. Stevens, 12 Wend., 590; Paige a. Ott, 5 Den., 406; Oakley a. Morton, 1 Kern., 25.) The writ should contain allegations of all such facts as are necessary to show that the relator is entitled to the relief he prays for. (*Tapping on Mand.*, 321, *Law Lib.*, vol. 60, p. 366, and cases cited; People a. Ranson, 2 Comst., 490; Commercial Bank of Albany a. Canal Bank Commissioners, 10 Wend., 25; People a. Supervisors of Westchester, 15 Barb., 607.) The writ is therefore defective, inasmuch as it shows upon its face that the certificates alleged to have been received by the relators were not signed by the register of the city and county of New York. Besides, the facts stated in the return are admitted, and it appears affirmatively that the register never signed any of the alleged certificates. 3. It cannot be presumed that the register was present with the other commissioners at the time the alleged certificates were signed, or that he in any way acted with the other commissioners in giving the same, or assented thereto; because, even conceding that a majority might give the certificates, they could exercise such power only upon a meeting of all. (3 *Rev. Stat.*, 867, 5th ed.; 2 *Ib.*, 555, 1st ed.; People a. Supervisors of Chenango, 1 Kern., 571, and cases cited.) Again, the writ should distinctly show the fact that all of the commissioners were present when such certificates were signed.

II. The relators, according to their own showing, are not entitled to the writ which they demand in this case. 1. The aggregate amount for which they claim to have obtained certificates from the commissioners of records is \$47,131.97. They ask for a writ, commanding the respondents to convene, and raise by tax the sum of \$193,820.26. Where the alternative mandamus demands too much, judgment must be given for the respondents. (People a. Supervisors of Dutchess, 1 Hill, 55; and see *Tapping on Mandamus*, vol. 60, *Law Lib.*, N. S., 439, marginal paging, 402, 403.) 2. A party is not entitled to a writ,

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unless he has a clear legal right to demand what is asked for in his writ. (People a. Supervisors of Chenango, 1 *Kern.*, 563; People a. Canal Board, 13 *Barb.*, 444; The People ex rel. Bailey a. Supervisors of Greene, 12 *Ib.*, 217; People a. The Corporation of Brooklyn, 1 *Wend.*, 324; People a. The Supervisors of Columbia Co., 10 *Ib.*, 366; Life and Fire Insurance Co. of New York a. The Heirs of Nicholas Wilson, 8 *Pet.*, 291; and see *Tapping on Mandamus*, vol. 60, *Law Lib.*, N. S., 62, marginal paging 9, 10.) It is not pretended that the relators have performed work amounting in value to the sum of \$193,820.26. (See *Writ*, 40, f. 110.) They have, therefore, no legal right to such a sum, or to process to enforce the raising of the same.

3. It cannot be contended that the recital in the writ, that the sum of \$193,820.26 is necessary to be raised in order to perform and complete the contract of the relators (even if such recital be true) entitles them to a mandamus; because, the relators have no right to the moneys in the hands of the Commissioners of Records, either by the law of 1855 or by the contract, until they have performed the work, labor, or services, to pay for which such money was raised. (*Laws of 1855*, 763; *Writ*, 6, 7.) The court cannot assume that the relators will ever perform such work, labor, or services. The relators are not empowered by law to determine what amount may become necessary to defray the expenses of executing the contract. The Commissioners of Records are the proper parties to make an application to the court for aid in raising such necessary expenses.

4. It is only when an expense has been incurred, and a proper certificate of the fact has been given by the commissioners, that the county treasurer is directed to pay the same, or the respondents authorized to raise the amount thereof by tax. The expense of \$193,820.26 is not alleged in the writ to have been incurred by the commissioners, and the return denies that such expense has been incurred. "Expense is defined as 'money expended or laid out.' To 'incur' means, 'to become liable to.'" (*Johnson's Dictionary*.) Of course the commissioners have not actually spent the sum of \$193,820.26. They have not become liable to the relators for that amount, nor can they become liable to them until the relators have performed work of that value. Performance of the work must precede the incurring of the expense. If the construction contended for by the relators is correct, the

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instant the contract was executed, and before any work was performed by them, the respondents were bound to raise any amount which the commissioners might deem that they would eventually require, to pay for work performed by the relators under such contract. Such a construction, it is respectfully submitted, would be absurd. 5. Again, it is only the "necessary expenses" that are to be paid by the county treasurer, or raised by the respondents. No expense can be considered as "necessary" until some legal liability has been incurred to make the same.

III. The Commissioners of Records are the proper parties to apply for process against the respondents, if they have illegally neglected to raise the "necessary expenses incurred by such commissioners." The application cannot be made by the relators, or any other private individuals.

IV. The writ of mandamus is a prerogative writ, and will not be granted where, as in this case, the court can see that a greater public inconvenience will result from its allowance than from its refusal. (*People a. Supervisors of Westchester*, 15 *Barb.*, 607, 617; 12 *Barb.*, 452; *Exp. Fleming*, 4 *Hill*, 581, 589; and see 13 *Barb.*, 450; *Van Rensselaer a. Sheriff of Albany*, 1 *Cow.*, 501.) 1. A large amount of taxes had been collected previous to the allowance of the alternative writ, and it would cause great embarrassment if the parties who have once paid their taxes for this year should be compelled to pay another tax. 2. The assessment-rolls have passed from the hands of the respondents, and it is not now in their power to add any thing to them. 3. Besides, the respondents, before the granting of the writ, had raised all sums they were directed by annual tax bill of 1859 to raise in this county.

V. There is no legal obligation resting upon the respondents to raise any money for the said Commissioners of Records. The act of 1855 is permissive and not mandatory in its terms. And this is not one of those cases in which permissive words will be construed as imperative. (*Rex a. Flockwood Inclosure*, 2 *Chitt.*, 251; *Rex a. Mayor of West Love*, 5 *D. & R.*, 414.)

VI. The respondents are vested, by the act of 1855, with a discretionary power, and with the exercise of their discretion the court will not interfere. (*Tapp. ut supra*, 65; *Hutchinson a. Commissioners of Canal Fund*, 25 *Wend.*, 692; *People a. Supervisors of Albany*, 12 *Johns.*, 414; *Hall a. Supervisors of*

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Oneida, 19 *Johns.*, 259; People *a.* Supervisors of New York, 1 *Hill*, 362.)

INGRAHAM, J.—An alternative mandamus was issued in this matter, commanding the respondents to raise by tax a sum exceeding \$193,000, to pay the relators the moneys now due them in relation to their contract with the Commissioners of Records, and to enable them to perform their contract, &c., or show cause why the same should not be raised, &c.

On the return of this writ, the respondents submit various objections thereto in their return.

The plaintiffs now move to strike out this return, or portions thereof, and for a peremptory mandamus, or for leave to demur.

Many of the objections taken to the granting of this writ are of a purely technical character, not involving the merits, and are such as should not be relied on by the Board of Supervisors in refusing to carry out the provisions of law defining their duties in regard thereto. It is wiser for public bodies, taking such a course, to sustain their action by an examination of the merits of the controversy at once, instead of postponing such discussion by resorting to objections upon mere matters of form. As, however, they are made part of this case, it is my duty to pass upon them as presented, so far as may be necessary to decide this motion. The return denies that McSpedon and Baker, the relators, ever obtained, or had in their possession, certificates of the Commissioners of Records for any amount due them on their contract.

The first and second paragraphs of the return would form a general denial of the allegation that the relators had not such a certificate, were they not qualified by sections 3, 4, 5, and 6, which set out the election of Miner as Register; that he was *ex officio* one of the commissioners, and that he did not sign the certificates.

Taken together, these six paragraphs can only be construed as averring that William Miner was one of the Commissioners of Records, and did not sign the certificates.

In form it is bad, because it leaves the defence to be inferred from the facts stated, instead of a distinct averment to that effect. An argumentative return is bad.

I think it is bad also in substance. It is not necessary that all the commissioners should sign the certificates. It is enough

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that they are signed by a majority of them. That appears to be the case as to all the certificates. The commissioners should all have notice of a meeting for the purpose, in order that all may consult together; but it is not in the power of any one who may be dissatisfied, in this way to prevent the payment of what would be a just claim.

In all cases where a public duty is to be performed by a specified number, although all must have notice of the meeting, the acts of the majority are binding. This rule is universal, except where the statute expressly requires the assent of all, and there is no good reason why it should not as well apply to a certificate to be given after the work has been performed, as to a resolution authorizing the contract for it in the first instance.

There are other objections to this return which would be worthy of examination, were it not that, for other reasons, the relators are not entitled to the peremptory mandamus; and even if the return should be quashed, the motion for such writ should not be granted.

The alternative writ shows that only a portion of the amount claimed to be raised by tax is due to the relators, and claims that the whole amount is required, in order to perform and complete the contract. It is clear, therefore, that at present the relators have no right to this fund, except the portion due for work already performed. They may never complete the contract, and never be entitled to any further payment. The rule is, I think, well settled, that a relator cannot have a peremptory writ unless he shows a clear legal right to what he asks for. (*People a. Supervisors, &c.*, 1 *Kern.*, 563; *People a. Canal Board*, 13 *Barb.*, 444, are cases so holding.)

It will not be pretended that these relators, at the present time, have any such claim. Whether they will have or not, at a future period, any such claim, is uncertain. It may not be required during the year, and, in case of a non-performance on their part, might not be needed at any time on this contract.

Whether they could apply for a mandamus as to the amount now due them is a question not necessary to the decision of this motion. It is enough that they are not entitled to what is asked for in the writ. To hold otherwise, would be to sanction the principle that any contractor with the city government might, before his contract is completed, insist that the amount contem-

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plated to be expended under his contract should be raised by tax, because it was possible he might require it during the coming year.

If any one has a right to such a writ, it must be the commissioners who have entered into the contract, and who will require the moneys for payment.

It may be said that a part of this sum is now due to the relators. That, however, does not relieve the difficulty. If the writ demands too much, there must be judgment for the respondents. The peremptory writ must follow the alternative mandamus, and there cannot be judgment for the relators for part, and for the respondents for the other part. (People *a.* Supervisors of Dutchess, 1 *Hill*, 50.) In the case from 4 Barn. & Cresw., 895, no objection appears to have been made on this point.

For these reasons, I am of the opinion that the motion for a peremptory mandamus should be denied, and that, although the return is defective, still there is no necessity to strike out any part of it, as no further relief could be given to the relators on this application.

As the return is defective, I think it proper to refuse costs to either party on this motion. Motion denied, without costs.

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PLEADING.—INSOLVENT'S DISCHARGE.

Upon demurrer to one distinct defence separately set up, no resort can be had to other portions of the answer where no reference to such parts is made.*

Effect of a bankrupt's discharge obtained in one country, upon a debt contracted in another previously to the passage of the statute under which the discharge was obtained.†

* Compare the Xenia Branch Bank *a.* Lee, 7 *Ante*, 372, and Martin *a.* Mattison, 8 *Ante*, 3. The latter case was affirmed at the general term in July, 1859. Present, MASON, BALCOM, and CAMPBELL, JJ.

† Compare Ballard *a.* Webster, 9 *Ante*, 404.

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Demurrer to part of an answer.

The complaint was as follows :

That at the several and respective times thereafter mentioned, the plaintiffs were, and now are, residents of the province of Canada, one of the colonial possessions of the kingdom of Great Britain, of which they are and always have been subjects.

That on the 21st of February, 1838, the plaintiffs recovered, in the Court of Queen's Bench, holden at Toronto, in the province of Upper Canada, within the jurisdiction of such court, a judgment for the sum of £282 5s. 7½*d.* current money, by reason of the non-performance of certain promises and undertakings, made by the defendant to the plaintiffs, together with a certain amount for costs.

That such judgment remains in full force and effect, in no wise satisfied, reversed, or annulled, as by an exemplification thereof, ready to be produced, would appear.

That the defendant has not paid the amount of such judgment, but still remains indebted to the plaintiffs therefor.

That the contract or undertaking upon which such judgment was had, was entered into between the plaintiffs and defendant in Upper Canada, and was there to have been performed.

Upon this judgment the present action is brought, and judgment sought for the amount, in dollars, with interest.

The portion of the answer demurred to sets forth a discharge, obtained by the defendant under the bankrupt law of the United States of 1841 ; and the discharge is set forth in proper form, and with proper averments as to jurisdiction and other particulars.

The plaintiffs demur to this part of the answer, "because the said discharge is no answer to the action on the facts set forth in the complaint."

Mr. Buckley, for the plaintiffs.

Mr. Eager, for the defendant.

HOFFMAN, J.—The demurrer is to be tested by the complaint, and the portion of the answer demurred to. I understand the rule to be, that upon a demurrer to one distinct defence sepa-

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rately set up, no resort can be had to other portions of the answer, unless, perhaps, when by a distinct reference they are made part of that demurred to.

The clause of the act of Congress of 1841, relied upon to give force to the present discharge, is as follows: "And such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act, and shall be, and may be pleaded as a full bar to all suits whatever; and the same shall be conclusive evidence of itself in favor of such bankrupt." (Vol. V., 444, § 4.)

It may be useful to notice that the bankrupt law of 1800 was similar. It provided "that every such bankrupt should be discharged from all debts by him or her due or owing at the time he or she became bankrupt, and all which were or might have been proven under the said commission." (1 *Laws U. S. by Story*, 744.)

Any decision of the courts of the United States upon the construction of this bankrupt law, emanating from the Congress of the United States, would, I apprehend, be authority, and supersede any thing to the contrary in the decisions of our own State. (7 *Johns. Ch. R.*, 303.)

I presume it is to be treated as settled law that if a contract had been made in this country, and a discharge obtained in a foreign country, it would be unavailing in an action here.

This proposition is explicitly decided in *McMillan a. McNeil*. (4 *Wheat.*, 209.) *McMillan* obtained his discharge in England, under the bankrupt laws in November, 1812. In November, 1811, he had given bonds at the Custom House for duties, with *McNeil* as his security. The bonds were paid by *McNeil* after suit in 1813, and in 1817 he sued *McMillan*. The bonds fell due before the discharge in England.

Ch. J. Marshall said, "that as the certificate under the English bankrupt laws it had frequently been determined, and was well settled, that a discharge under a foreign law was no bar to an action on a contract made in this country." The suit was brought in Louisiana.

In *Cook a. Moffatt* (5 *How. (U. S.)* 295), it was decided that the insolvent law of Maryland could not discharge one of its

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own citizens from a contract made in New York, with citizens of that State. The suit was brought in Maryland.

The goods were purchased in New York. The notes, though made in Baltimore, were delivered in New York, and payable there. They were governed by the law of that place.

The position was distinctly announced, that the State insolvent laws could have no effect to discharge a contract made before their enactment, or beyond their territory.

But while this is the proposition of the majority of the court, it is sufficient for the present case to notice that all concurred in holding, as Justice Woodbury and Justice Daniels hold, that the contract being a foreign one, could not be affected by the bankrupt systems of other States. I need not enter into the great and important differences in the views of the judges. Justice Woodbury treats the matter on the ground of settled international law, without reference to any constitutional question. The contract made in one place, cannot be affected by the bankrupt law of other countries.

So in a leading English case (Phillips *a.* Allan, 8 *Barnw. & C.*, 477), BAYLEY, J., said: "It was properly conceded that a discharge in a foreign country will not of necessity preclude an English creditor from suing in an English court, in respect of a debt contracted in England. It has been decided that a certificate under a commissioner of bankruptcy issued in Ireland, since the union, does not discharge a debt contracted in England. (Lewis *a.* Owen, 4 *Barnw. & A.*, 654.) But a discharge of a debt, pursuant to the provision of an act of Parliament of the United Kingdom, which is competent to legislate for every part of the Kingdom, and to bind the rights of all persons residing either in England or Scotland, and which purports to bind subjects in England and Scotland, operates as a discharge in both countries."

The interpretation of the decisions of the Supreme Court, given in the Court of Appeals in Donnelly *a.* Corbett (3 *Seld.*, 500), may be usefully referred to. It was held that a State law, by which a debtor was discharged from his debts, was valid as respects contracts made after its passage between citizens of the same State, but invalid as to all contracts made elsewhere, where a citizen of another State is a party.

Justice Gardiner quotes Justice Johnson's statement of the

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effect of *Ogden v. Saunders*, that as between citizens of the same State, a discharge of a bankrupt by the laws of that State is valid as it affects posterior contracts; as against citizens of other States, it is invalid as to all contracts. He then discusses the theory of bankrupt laws becoming part of the contract, and thinks that upon that theory, a creditor is as much to be considered recognizing a right to legislative prospectively, within a constitution, as to be governed by an existing law. Yet the United States courts had always held otherwise, as to laws passed subsequently. He adds, "The notion, however, that insolvent laws constitute part of the agreement of the parties, under any circumstances, has been considered as fallacious by judges of the court, in which the doctrine was first broached. (5 *How. (U. S.)*, 311.) The permission accorded by these laws to a debtor to absolve himself is an act of sovereignty induced by considerations of public expediency. It is the exercise of a power not derived from or dependent upon contract, but beyond and in hostility to it. The public good, or the exigencies of a State may require the taking of private property without the consent of the owner, or the discharge of a debt without the consent of a creditor; but the idea that the justification in either case rests on contract, or depends upon the assent of the holder, has scarcely the merit of plausibility.

The dissenting reasoning of Chief-justice Taney in *Cook v. Moffat*, is, I presume, here alluded to. He says: "According to established principles of jurisprudence, such laws have always been held valid and binding within the territorial limits of the State by which they are passed, although they may act upon contracts made in another country, or upon the citizens of another nation; and they have never been considered on that account as an infringement on the rights of other nations or their citizens. But beyond the limits of the State they have no force except such as may be given to them by comity."

And Judge Story in his *Treatise on the Conflict of Laws* observes: "If the State, by its own laws should provide that a discharge of an insolvent debtor, under its own laws, should be a discharge of all contracts, even of those made in a foreign country, its own courts would be bound by such provisions." (§ 388.)

If this is the theory of the law upon this subject—if it is the mere exercise of a sovereign power, from reasons of expediency

which the depository of that power is alone to judge of, then, at least, the provisions which discharge a contract made beyond its territory with a citizen of another State, and made before the enactment, should be so explicit and positive as to leave no possibility of any other conclusion.

In this view, we come to a question of construction, and there are several decisions, some in our own State, which tend to illustrate it.

In *Penniman v. Meigs* (9 *Johns.*, 325), the defendant had obtained his discharge in November, 1811, under the insolvent law then in force. This must have been either that of April 3, 1801 (*Sess. Laws*, 24th *Sess.*, 131); or that of April 3, 1811 (*Sess. Laws*, 34th *Sess.*, 200). The court held that it was bound to consider a discharge under the insolvent act of this State as a bar to all suits brought here upon antecedent contracts, wherever made. The statute was peremptory, and binding on our courts. It was for the Legislature to say whether foreign contracts should be exempted from the operation of our insolvent law, but it has not made any such exception.

The act of 1801 provided, "that the court should discharge such insolvent from all debts due at the time of the assignment, or contracted for before that time, and payable afterwards." The act of 1811 (34th *Sess.*, 201, § 3), is, in this particular, nearly in the same language.

Although the *decision* in *Penniman v. Meigs* is not now law, as Chancellor Kent observes, in *Hicks v. Hotchkiss* (7 *Johns. Ch. R.*, 297), being overruled by *McMillan v. McNiel* (before cited), yet it is overruled by the construction of the constitution of the United States. As a rule of interpretation of a statute, if valid, it remains untouched.

And accordingly, in *Murray v. De Rottenham* (6 *Johns. Ch. R.*, 59), Chancellor Kent cites and adopts it. He says, "that the insolvent act referred to in that decision did not expressly include foreign debts contracted abroad any more than the Bankrupt Act of the United States. It used only general language. It was a decision well considered at the time, and the language in which it was expressed was carefully selected."

He expressly decided in that case, that the certificate of discharge under the bankrupt act of 1800 was a bar to foreign as well as domestic creditors. "That act is general in its terms,

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and applied to all debts which were, or might have been proved under the commission." I do not apprehend that we are to require an express declaration of the Legislature that foreign creditors are included in the operation of a bankrupt law, when the language of the statute is otherwise sufficiently general and comprehensive.

It is very difficult to reconcile this opinion with that expressed by the same eminent jurist in *McMenomy v. Murray* (3 *Johns. Ch. R.*, 440). He there says, "These debts (*by Speyer*) were contracted in Germany, and payable in Germany; and the discharge of Speyer by the bankrupt law of this country will not discharge him from those debts, unless those foreign creditors have assented to that proceeding, by coming in and proving their debts. A bankrupt or insolvent act ought not to be presumed to have been intended to reach foreign contracts, unless it be so declared."

It may not be useless to notice, that the law in our State was so altered in the revision of 1813, as to provide that foreign, as well as domestic debts should be discharged, if two-thirds of all the creditors in amount, including such debts, had united in the petition. (1 *Rev. L.*, 464, § 8.) But in 1830, the system was changed, and under it the demands of foreign creditors, upon debts contracted elsewhere, are not affected, unless they have united in the petition, or accepted a dividend, or unless the contract was to be performed here, or the creditor had become a resident prior to the publication of the first notice. (2 *Rev. Stat.*, 22, § 30.)

The revisors say that the whole current of authorities settles beyond dispute that foreign creditors cannot be affected by a discharge without their consent. (Vol. III., 617.)

Upon the question of the construction and extent of the statute, the case of *Reimsdyck v. Kane* (1 *Gallison R.*, 371) is of importance. Justice Story there says:

"Every State has within its own sovereignty an authority to bind its citizens everywhere, so long as they continue their allegiance. It may act upon the contract made with its own citizens in every country, and consequently may discharge them by general laws. But such is not the operation of jurisdiction in contracts made by a citizen with a foreigner, in a foreign country. If, in such a case, the legislature, by positive law, nullify

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such contracts, it is certain that they cannot be enforced within its own tribunals. But if a statute be general without a direct application to foreign contracts, the rule approved by Casaregis seems proper to be adopted, that its construction should not be extended to such contracts. *Ratio est, quia statutum intelligit semper disponere de contractibus factis intra, et non extra territorium suum.* (*Casaregis Dis.*, 130, §§ 14, 15, 16, 20, 22.)"

As a rule of construction of the statute in question, the authorities upon the act of 1800, and our own State law, are so controlling that I do not feel at liberty to differ from them. The language of the present statute is nearly identical with that of the previous act. The discharge affects whatever debts could have been proven. (*Laws of U. S.*, vol. 5, 444, § 4.)

Upon the question whether the act can, upon the doctrines of general international law, be extended to foreign contracts, the authorities seem also controlling. Yet in the Court of Appeals in Maryland a different doctrine has been declared. (*Lizardi v. Cohen*, 3 *Gill's Maryl. R.*, 43; *Court of Appeals*, 1845.) Bills were drawn in New York, by Josephs & Co., upon the plaintiffs in London, trading there, and was there accepted and paid. London was to be considered as the place of the contract. Josephs, one of the drawers of the bill, had been discharged in 1842, under the bankrupt act of 1841.

The question arose upon an objection to Josephs as a witness, and became a principal question in the case.

The court say: "Treating London as the place of the contract, it is clear, and indeed was not disputed, that the debt thus created could not be reached and extinguished by the discharge of Josephs under the bankrupt law of the United States. No principle of international law is more firmly settled, than that a discharge of this character can have no extra-territorial operation." The late Judge Story speaks of the doctrine as well established, that the discharge of a contract by the law of a place where the contract was not made nor to be performed, will not be a discharge in any other country. (*Conflict of Laws*, § 283.)

I decide the demurrer upon a strength of authority which I am not at liberty to contest. If the point was open, I should conclude that when the law of a State will give no effect to a foreign discharge in relation to a debt contracted within its

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own dominion, the rule of justice, comity, and reason, dictates that it should not support a discharge against a debt contracted elsewhere; and especially when its statute of discharge was passed after the debt was due. The reverse is a rule contrary to the all-predominant doctrine of the *lex loci contractus*, and contrary to every idea of the relations which creditor and debtor could have imagined were to exist between them, when the agreement was entered into.

The judgment will be for the defendant on the demurrer, with costs.

LIPPMAN *a.* PETERSBURGH.

New York Common Pleas; Special Term, September, 1858.

ARREST.—AFFIDAVIT.—ALLEGATION OF OWNERSHIP.

In an action by a married woman respecting her separate property, an affidavit on which to obtain a provisional remedy—*e. g.*, arrest—is not insufficient because it alleges in general terms that the property in question was her separate and individual property, without showing how it became so.*

Motion to vacate order of arrest.

The facts are stated in the opinion.

Mott, Murray, and Harris, for the motion.

A. J. Dittenhoffer, opposed.

BRADY, J.—The allegation of the plaintiff, that the money obtained from her by the defendant was her separate and individual property, is subject to the criticism that it is a mere conclusion of law, and this view presents the only material question upon the motion to discharge the order of arrest. The defendant, however, in moving upon the plaintiff's affidavit, admits the contents thereof to be true, and if a conclusion of

* Compare *Howland a. Fort Edward Paper Mill Co.*, 8 *How. Pr. R.*, 505; *Stalers a. Barhite*, 2 *Car.*, 221, and *Wasserman a. Willett*, *Ante*, 63.

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law, as in this case, stands as a fact alleged, I do not see how it can be said with justice, that the averment either as a conclusion of law or as a fact, is not truthfully made. If, on the complaint an issue were framed upon the plaintiff's title, whether she owned the property or not, it would necessarily depend upon certain facts to be established, and the issue would be, Was the money fraudulently obtained by the defendant the separate property of the plaintiff's? In aid of this, it appears that the plaintiff was in possession of the money, and she may have received through a trustee during the absence of her husband, or under the decree of the Chancellor of Illinois, in pursuance of the statute laws, 1857, p. 52, section 1, which contemplates in certain cases such a ceremony. It is only necessary that a *prima facie* case should be presented on affidavit to authorize an order of arrest, and if the facts and circumstances detailed are sufficient to satisfy the judge making the order that a cause of action exists, the order should issue. In *Depeu v. Lent* (2 *Abbotts' Pr. R.*, 131), which was an action of claim and delivery of goods, the affidavit of the plaintiff as to a part of the goods claimed was that he was the owner, and as to that, on objection, Justice Hoffman said: "The plaintiff swears to an absolute ownership, and so far his proceedings are unobjectionable."

There are cases parallel to this, in which the allegations upon which the plaintiff predicates his course of action are legal conclusions. For example: that he sold and delivered certain goods. A sale is a legal conclusion predicated on the acts of the parties, and a delivery upon the act of the person alleging it to have been made. So in actions for the recovery of personal property, the general allegation that the plaintiff was the owner is the usual form of statement, and has not, that I am aware of, been declared to be objectionable. For all purposes it is sufficient, and if the details of the ownership were spread upon the record, that form of procedure might lead to a statement of the evidence going to prove it. That would be objectionable. Upon a full and careful consideration of the question, therefore, I have arrived at the conclusion that the averment of separate ownership not denied, coupled with the fact that there is a statute of Illinois under which the plaintiff might have become possessed of the money, is sufficient, and that upon such

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a state of facts the question should not be disposed of on a mere objection to the affidavit upon which the order of arrest was granted. In reference to the suggestion of the voluntary appropriation by the plaintiff of the money claimed to her husband's use, I deem it only necessary to say that the money was obtained by fraud—that no title passed to any person, and that the husband, even if the trust were valid, could not interfere with the plaintiff in her right to require the application of the fund as designed.

Motion to discharge denied, but without costs.

SEAVER *a.* GENNER.

Supreme Court, First District; Special Term, November, 1858.

SHERIFF.—BAIL.

A sheriff who becomes bail may surrender his principal by rearresting him.

Motion to discharge from imprisonment.

DAVIES, J.—The defendant in this case was arrested under subdivision 3 of section 179 of the Code. His sureties failed to justify, and the sheriff, therefore, became his bail. This is by section 201 of the Code, and as held by Justice Ingraham in *Santos a. Marceques* (9 *How. Pr. R.*, 188).

The sheriff has, therefore, all the rights of bail, and the same rights as though he was the bail and had justified.

One of the rights thus secured to the bail, by section 188 of the Code, is to surrender their principal. That the sheriff has done here by the rearrest of the defendant, his principal; and that he can do this, I think, is well settled by the case cited above.

But it seems to me that such surrender can have no greater effect than if made by the bail; and what such effect is, will be seen by the last clause of subdivision 2 of section 188 of the Code.

Cohen's Case.

But, without determining the effect of this rearrest of the defendant by the sheriff, I have no doubt that it was lawfully made, and the motion to discharge him must be denied, with costs—\$10.

COHEN'S CASE.

New York Common Pleas ; Special Term, June, 1859.

INSOLVENT'S DISCHARGE.

Facts throwing suspicion upon the honesty of the insolvent's proceedings.

Petition for a discharge in insolvency.

HILTON, J.—Cohen, the applicant, upon a petition signed, or purporting to be signed by two-thirds of his creditors, asks to be discharged from his debts.

He has been examined by several creditors opposing his application, and a careful perusal of his examination fails to satisfy me that he has honestly and fairly given a true account of his estate.

His debts amount to over \$30,000, as appears by the schedule annexed to his petition, and yet he says that no one owing him any money, at any time heretofore, has failed to pay him. His business and all his property seems to have become vested in his son, who lives with him, and it does not appear in what manner the son acquired the means wherewith to become the purchaser. These facts, in addition to the unsatisfactory account given by the applicant of his various alleged debts to the petitioning creditors, throw a suspicion upon the application, which is heightened by the examination of a few of those creditors who are assisting him in his endeavor to obtain the discharge applied for.

The testimony of Marcus E. Harris, who is one of these, shows the alleged indebtedness to him to be clearly fictitious, and the same may be said of the alleged indebtedness to Men-

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dell Joseph, and to the greater part of Jacob Cohen's pretended claim.

Rejecting these, and conceding all the remainder to be actual debts owing by the applicant, there would not be two-thirds in amount of his entire indebtedness owing to the petitioning creditors.

For these reasons his application for discharge is refused.

BILLING'S CASE.

Supreme Court, First District ; Special Term, August, 1859.

INSOLVENT'S DISCHARGE.*

The trust resulting to the debtor in respect to any surplus that may remain after payment of debts under an order appointing a receiver of his property, or under a general assignment for the benefit of creditors, is an interest which the debtor must disclose and assign in proceedings to obtain a discharge from his debts

* In the case of *THE RUSSELL & ERWIN MANUFACTURING CO. v. ARMSTRONG* (Supreme Court, First District ; Special Term, March, 1860), it was held that the court would not in a collateral motion inquire into the validity of a discharge, questioned on jurisdictional objections.

It appeared in that case, that in 1855, the plaintiffs recovered judgment against the defendant for about \$250. In 1857, the defendant procured a discharge from his debts, under the two-third act. Notwithstanding such discharge, the plaintiffs, on the 13th of January, 1860, caused an execution to be issued on the judgment directed to the Sheriff of Kings County, and the same was levied on the defendant's property, acquired since his discharge.

Defendant now moved to set aside the execution.

C. E. Lester for the plaintiffs, resisted the motion on grounds of defects in the papers, which he insisted rendered the discharge void.

N. Burchard & B. F. Sawyer, for the defendant, contended that so far as the hearing of this motion was concerned, the discharge was conclusive ; that the plaintiffs could not issue an execution upon a judgment obtained previous to the granting of a discharge regular on its face, but must bring their action upon the judgment, in order that the validity of the discharge might be first passed upon by a jury and declared void for any of the causes enumerated in section 40 of the

*affirmed
17 Abb. 472*

Billing's Case.

Petition for a discharge in insolvency.

INGRAHAM, J.—It is apparent from the petitioner's examination that he held notes and securities which he has not stated in the account of his property, and that he may also have an interest in the property conveyed to Chave, and the Saratoga land, although the legal title is in another person.

The appointment of a receiver for the benefit of a creditor, or the execution of an assignment to an assignee for the benefit of all his creditors, does not so divest the petitioner of the property as to deprive him of any interest that may remain after payment of the claims so provided for. The statute requires an account of the property and of the charges affecting the same. Property passed to a receiver, or a right to any surplus therein, should be stated, and the judgment and appointment of the receiver should be stated as the charge affecting the property. The same statement should be made as to an assignee. The object of the statute is to enable the creditor to ascertain whether the debtor has reserved any property from his creditors, and if the debtor may under the appointment of a receiver say he owns no property on that account, he may very easily conceal from his creditors a large amount which otherwise could be applied to the payment of his debts.

There can be no difficulty in this case in making a proper statement, and I think the petitioner must do so before he can be discharged under the statute.

The application must be denied.

two-third act, or on account of some jurisdictional defect apparent upon the face of the papers.

W. F. ALLEN, J., on this ground granted the motion, and set aside the execution, but without costs to either party,

Hunter *a.* Lester.HUNTER *a.* LESTER.*Supreme Court, Seventh District ; Special Term, January, 1860.*

AFFIDAVIT OF MERITS.—SUMMONS.—SERVICE AND PROOF OF.

Proof of service deemed to be made out, on conflict of affidavits.

An affidavit of merits, alleging that the note in suit has been paid, without stating when, where, or how, is insufficient as a ground of motion to open a judgment.

Service of a summons by a party is a mere irregularity, which cannot be taken advantage of after judgment.*

* That a printed subscription of a summons is sufficient, was recently held in the case of *THE MUTUAL LIFE INSURANCE COMPANY a. ROSS* (*Supreme Court, Seventh District, Special Term, March, 1860*). This was a foreclosure action. It came up on a motion made by a defendant to set aside the summons and notice served upon him, on grounds which fully appear in the argument of the plaintiffs' counsel.

G. G. Munger, for the motion.

McCurdy & Betts and *George E. Mumford*, opposed.—This application is in behalf of Hubert McMaster, a judgment-creditor in a foreclosure suit. The copies of the summons to be served were sent to the sheriff of Livingston county to serve, under the Code (§ 134, subd. 4, ed. 1859). The words are: "The summons shall be served by delivering a copy thereof as follows." Then come subdivisions 1, 2, and 3, referring to particular cases; lastly, subd. 4: "In all other cases, to the defendant, personally." The summons in this case appears to have been regularly served by delivering a copy. There has been a decision at special term, in New York, by Judge Ingraham, that the summons filed with the papers must be signed in writing, with the name or names of the plaintiff or his attorney. In that case the summons had been filed, and the plaintiff had liberty to file another copy, *nunc pro tunc*. (*Farmers' Loan and Trust Company a. Dickson*, 9 *Abbott's Pr. R.*, 61.) That case applied to the original summons filed with the proceedings, and therefore is not applicable to this case. (§ 134.) If it were, we would respectfully ask that it might be reviewed, particularly as we understand that certain special circumstances alone prevented an appeal. But—I. The decision is not applicable to this case; this being alleged to be a service of a copy of the summons, personally, on defendant. Even if it be necessary to sign with a pen, in writer's ink, the original summons, it surely is not required in a copy.

II. The motion is, in part, founded on the service of the summons by delivering a copy being a nullity. This defeats itself. If a nullity, the defendant may so regard it. This court will not interfere to declare a null act null.

III. If the motion be made on the ground of irregularity, it is premature. The copy of the summons served is undoubtedly in literal compliance with the statute. Whether the summons itself is so or not, cannot be told until it is brought

Hunter a. Lester.

Motion to vacate a judgment, and execution issued thereon, for irregularity in the judgment.

Mr. Pingree, for the motion.

J. R. French, opposed.

The facts are stated in the opinion.

before the court, and some action of the court sought upon it, or some proceeding taken.

IV. If this application were made on the ground of the original summons being subscribed with printer's ink in printer's types, instead of writer's ink, and in the identical hand-writing of the plaintiffs' attorney; it is submitted that the court would not grant it, for the following reasons: 1st. The objection to the summons is made on etymological grounds; namely, the words "the summons shall be subscribed by the plaintiff or his attorneys," means that it must be written under. It cannot be sustained on those grounds; and if not on those, it cannot be on any other. The whole analogy of language will show that it means no such thing. The word "scribe" in any combination, although derived from *scribo*, to write, does not necessarily mean writing with a pen or other instrument, with ink or otherwise. Ascription means attributing. We ascribe Power to the People; Majesty to Kings; Wisdom to Judges, &c. Conscription is a denunciation of enemies, or a levying of soldiers. Description means giving an account, a relation by words, pictures, symbols, or even sounds; and is by no means confined to writing. Inscription infers affixing pictures, figures, or words on other objects; and inscriptions on monuments, the most common use of the term, refers to infixing by means of tools. Inscriptions on coins mean the legends, and not the writing. A prescription with a lawyer, is a right acquired by a lapse of time; with a physician, a direction, verbal or otherwise, to an apothecary. A rescript is an edict. It is the enactment and promulgation that makes a rescript; whether written, printed, or proclaimed. It is the thing, and not the name of it, that is essential. So a subscription is the fact of having one's name with authority written, printed, or placed upon or after some paper, subject, or matter. An assent to a cashier's letter, asking if a person will authorize a certain number of stock shares to be taken for him, is a subscription for that stock. A compliance with a request to give a certain amount in aid of a church or a charity, a proceeding by no means uncommon, is a subscription to that amount. It is idle to enlarge on this subject. In not one instance is writing indispensable. If the domain of philology, intricate to all except experts, be entered, the courts will soon find themselves in wandering mazes lost. The statute is complied with by a printed subscription of the name.

V. The contemporaneous exposition and practice of the profession has been different. Under the old practice, and since the Code, the usage has been very extensive of using printed blanks with the printed names of the attorneys, and has always been considered in compliance with the term requiring *subscription*. By rule 10 of the Supreme Court it is provided that on process or papers to be served, the attorney, besides subscribing or indorsing his name, shall add thereto his place of business. The counsel in this case has, at this very moment, a notice be-

Hunter & Lester.

KNOX, J.—On the first day of February, 1850, John P. Hunter, one of the plaintiffs, served upon David D. Lester, the defendant, at the town of Sterling, in Cayuga county, a copy of the summons and complaint in the usual manner. This affidavit of service was made April 27, 1857. There is, on the back of the complaint, an affidavit of service made on the 5th day of February, 1850. This last affidavit is defective, in not showing where or how the service was made. On the said 27th of April, 1857, a judgment was entered in Cayuga county by default, against defendant, for \$271.68.

The above facts appear by the judgment-roll. On or about the 28th of September, 1859, an execution was issued on the judgment.

This motion is to set aside the judgment and execution on two grounds. First, that there never was any service in fact of the summons or complaint on the defendant; and, second, that if there ever was a service, it was made by the plaintiff himself, and that by such a service no jurisdiction was acquired.

The defendant swears that the summons never was served,

fore him subscribed in printing, "Greene C. Bronson, counsel to the Corporation, No. 237 Broadway," served subsequently to Judge Ingraham's decision. No doubt this learned jurist thought that he was complying with the rule. Other papers, similarly subscribed, are constantly received.

VI. The subscription in print is a strict compliance with section 128 of the Code. If it were otherwise, the court would, where the substantial end is gained of giving due notice, disregard a trivial error. It is beneath the dignity of the court to observe trifles. Cicero ascribes to the legal critics of etymological niceties the term of "*anceps syllabarum*," a term by no means respectful. Our common law, with a sarcasm unusual in its grave axioms, says with pointed force, "*qui hæret in litera, hæret in cortice*." Even, therefore, if the irregularity arose under section 128, that section having been really and substantially complied with, the court will not interpolate the words "in writing with a pen" after the word "subscribed," in order to give a meaning to the sentence, which is not fair and is unnecessary. The irregularity complained of, however, having reference to section 134, subdivision 4, which directs the service to be made by delivering a copy, there is no foundation for the application. There is no pretence nor allegation that this was not a copy of a summons.

The three last points apply likewise to the subscription of the notice accompanying the summons.

E. D. SMITH, J.—After consideration, denied the motion with costs, upon the ground that a printed subscription is a substantial compliance with the statute, and the objection was technical, and if there were a defect it was immaterial.

Hunter *a.* Lester.

but that, on the first of February, 1850, when the affidavit annexed to the judgment-roll shows it was served at Sterling, Cayuga county, he, the defendant, was at Argyle, in the county of Washington; and the affidavits by John Lester and George W. Lester say, "they are very positive they saw Lester in Argyle, on the first of February, 1850."

On the other hand, there is John P. Hunter's affidavit, that he did serve the summons, on the first day of February, 1850, on defendant at Sterling; the affidavit of Robert P. Hunter, that he saw him that day in Sterling, as he and his brother went there for the purpose of serving the summons. The affidavit of Robert Hume, who swears that he knows, from recollection and papers, that defendant was in Sterling on the first day of February, 1850; the affidavit of Hoxie, Cooper, and George T. Hunter, to the effect that the defendant was in Sterling on the first day of February, 1850.

I think there is no ground to doubt that the defendant is mistaken, and has forgotten that the summons was served upon him at the time and place stated. It is nearly ten years since the service was made, and he may well have forgotten the fact. Not so with the plaintiff, who made an affidavit of such service on the 4th of February, 1850, four days after.

Had the defendant made an affidavit of merits, or, when he swears generally "that the note has been paid," had he stated how, or where, or when paid, perhaps it would have presented a case where the court would feel justified in referring it to a referee to take proof, &c., as to whether the summons was served. But the defendant merely swears that "the promissory note upon which this action is founded has been paid, according to defendant's best knowledge and belief," and there are some facts stated in the affidavit which lead me to believe that the defendant, long before the judgment was entered up, did not claim that the note was paid, but only that it was "outlawed."

As to the second ground of the motion, section 133 of the Code provides that "the summons may be served by the sheriff of the county where the defendant may be found, or any other person not a party to the action." I think the service of a summons by the party is a mere irregularity, which may be corrected by motion before judgment, but not afterwards. This was so held in *Myers a. Overton* (2 *Abbotts' Pr. R.*, 344), by Justice

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Ingraham. "The irregularity arises, not from the want of service, but from the mode of making it," is his language.

The defendant, if he desired to avail himself of the irregularity, should have made his motion at the first opportunity.

Motion denied, with \$7 costs of opposing.

HOWE *a.* SEARING.

New York Superior Court; General Term, March, 1860.

GOOD-WILL.—BUSINESS NAME.*

The naked sale of the good-will of a business does not transfer a right to the use of the vendor's name of trade. ■

After the sale of the business-stand and good-will the vendor, Howe, by agreement with his vendee, obtained the privilege of resuming the business at another stand, covenanting not in any manner to interfere with the business carried on at the former stand, known as "Howe's Bakery."

Held, that this was no recognition of the vendee's claim to use Howe's name.

Appeal from a judgment at special term.

The action was brought by the plaintiff, a baker by trade, to restrain the defendant from designating the bakery establish-

* COMSTOCK *a.* WHITE (*Supreme Court, First District; Special Term, February, 1860*).—This case came up on a motion to dissolve an injunction, involving questions of a similar nature.

The facts appear in the opinion.

SUTHERLAND, J.—There is nothing in the papers submitted on this motion, to show that the defendants, White and Moore, or either of them, individually or as partners, ever had, in fact, the exclusive right to compound, manufacture, and sell the pills called "Dr. Morse's Indian Root Pills;" although it does appear from these papers that White and Moore, by the yellow labels or wrappers used by them around the pill-boxes, prior to the partnership between the plaintiffs and the defendant White, represented and advertised Moore as the proprietor of the pills, and stated that none could be genuine without the signature of A. B. Moore.

Neither White nor Moore could have had this exclusive right of manufacture and sale, without a patent from the government; and it is not to be presumed that the government had secured to either of them, or would secure to any one, an exclusive right to manufacture and sell these pills as a useful invention.

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ment kept by him at No. 432 Broadway, in the city of New York, as "Howe's Bakery," and from otherwise using the name of Howe in the business, so as to induce the public to believe that the business carried on at 432 Broadway was conducted by the plaintiff.

The plaintiffs, therefore, did not and could not acquire from the defendants, White and Moore, or from either of them, an exclusive right to manufacture and sell these pills, either by the written agreement of the 10th of August, 1855, between them and White, or by the written agreement subsequently entered into between the plaintiffs and White as partners, and the defendant Moore; and as I find nothing in the papers to show that the plaintiffs have otherwise acquired, or now have, this exclusive right of manufacture and sale, I conclude that they in fact have no exclusive right to manufacture and sell the pills.

From aught I see, the defendants and all other persons have the same right, or as good right as the plaintiffs, to mix or combine the chemical, mineral, or vegetable constituents composing these pills, round them into shape, advertise and puff them as pills, and a sovereign remedy for nearly all the ills that "flesh is heir to."

Conceding that White, before entering into partnership with the plaintiffs, represented to them that he was the owner or proprietor of the pills, and that Moore represented himself to be the owner or proprietor in the written agreement between him and the plaintiffs and White, the plaintiffs must be presumed to have known the law; and they, therefore, had no right to understand or rely upon such representations as meaning or affirming that either White or Moore had an exclusive right to manufacture and sell the pills.

Conceding that such representations to have been made by the defendants (White, however, denies that he made any such representations), the fact of such representations having been made by the defendants to the plaintiffs, would not authorize the court to restrain the defendants from the mere manufacture and sale of the pills, because the plaintiffs had no right to rely on such representations as affirming an exclusive right of manufacture and sale.

If, therefore, there is any clause or provision in the injunction in this case as it now stands, which prohibits the defendants, or either of them, from manufacturing, advertising, or selling by any name, designation, or trade-mark whatsoever, pills precisely like those manufactured and sold by the plaintiffs by the name of "Dr. Morse's Indian Root Pills," or pills composed of the same elementary constituents, the injunction must be so far modified or dissolved.

I do not see why the defendants have not the same right to manufacture, advertise, and sell the pills that the plaintiffs have.

The material questions in this case are, whether the defendants have a right, as against the plaintiffs, in advertising and selling the pills manufactured by them, to use the name or designation, "Dr. Morse's Indian Root Pills," or a trade-mark, label, or wrapper, so much like that which the plaintiffs have used and are using, in advertising and selling pills manufactured by them, as to be likely to deceive the customers of the plaintiffs and others, and induce them to believe that they are buying pills made by the plaintiffs, when in fact they may be buying pills made by the defendants.

It is very clear, too, that the injunction in this case must be dissolved, or modi-

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Upon the trial at special term, it was proved that about eight years ago the plaintiff was carrying on this business at 432 Broadway, and had done a large and lucrative business there; and, during all the time he carried on the business, the premi-

fied so far as it restrains the defendants, or either of them, from using their own names, or the name of either, or the partnership name of A. J. White & Co., in the business of manufacturing, or in advertising or selling these pills or any other pills.

It appears that the defendants are partners, and that the name of the firm is A. J. White & Co.

I do not see upon what principle the defendants can be prohibited from using their own names, or the name of either, or the partnership name of A. J. White & Co.

If the defendants have the right to make, advertise, and sell pills precisely like those made and sold by the plaintiffs, the defendants must have a right to use their own names, or the name of either, or the partnership name, "A. J. White & Co.," in the business of manufacturing, advertising, and selling them.

The fact that while the defendant White was in partnership with the plaintiffs in the business of making and selling the pills, the firm-name was A. J. White & Co., does not appear to me to affect or impeach the right of the defendants as partners in the same business, to use the same partnership name, such copartnership between White and the plaintiffs having been dissolved. Nor can I see how the defendants by their conduct or acts in severing their business connection with the plaintiffs, and in seizing and removing the property of the former firm of A. J. White & Co., however unjustifiable, could forfeit their right in forming the new partnership to use the same firm-name.

The remaining questions presented by this motion are questions of more difficulty. I think, however, after a careful consideration of all the facts and circumstances of the case, and a careful examination of the very able briefs submitted by the counsel, and of most of the numerous cases cited by them, that the injunction in this case should be retained and the motion to dissolve it should be denied, so far as it restrains the defendants, or either of them, from using the name or designation, "Dr. Morse's Indian Root Pills," in designating, marking, labelling, advertising, or selling the pills manufactured by them. I think the plaintiffs have a right as against the defendants, to the exclusive use of the name, designation, or trade-mark, "Dr. Morse's Indian Root Pills," in designating, marking, labelling, advertising, or selling the pills manufactured by them.

I am careful to say, I think the plaintiffs have this exclusive right as against the defendants, and I do not mean to say or express an opinion, that they would have this exclusive right as against Dr. Rogers, if he is not really a fictitious person, or as against a stranger, who had never been in any way connected with either the plaintiffs or defendants in manufacturing and selling pills by that name or designation.

I put my opinion on this point, on the special facts and circumstances of this case; and particularly on the conduct or acts of the defendants, in connecting themselves with the plaintiffs in the business of manufacturing, advertising, and selling pills by such name or designation, inducing the plaintiffs to expend large sums of money in advertising and puffing with all the verbose exaggerations

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ses had been known by the name of "Howe's Bakery," and that during that time they had gained great celebrity by that name; that about eight years ago Howe sold out his lease of the premises, and all the stock, wagons, and fixtures used by

which belong to the stereotyped quack literature of the day, the pills so manufactured; and then, in suddenly, without notice, in an unjustifiable manner, and apparently from improper motives, severing their connection with the plaintiffs, and setting up the same business of pill-making, pill-puffing, and pill-vending for themselves.

I think also, the injunction should be retained, so far as it restrains the defendants from using either of the labels or trade-marks referred to in the complaint in this action, and annexed to it as exhibits "C," "D," and "F," or any other label or trade-mark, so much like these labels or either of them, as to color of ground, vignette, name of pills, and general appearance, as to be likely to be easily mistaken for either of those labels.

It appears that the plaintiffs, or the former firm of A. J. White & Co., composed of the plaintiffs and the defendant White, originated the labels or trade-marks, C and D, with the exception of the name of the pills thereon, and exclusively used them or one of them with the name of the pills thereon, during the time the defendants were connected with the plaintiffs, in the business of making and vending pills, and that the plaintiffs are now using the label D.

It also appears, that the defendants, after dissolving their connection with the plaintiffs in the way they did, commenced using the label or trade-mark F, which has the name or designation "Dr. Morse's Indian Root Pills," prominently thereon, and so closely resembles label D in vignette, color of ground, and in other particulars, as hardly to be distinguished from it.

I look upon the question between the parties in this case as questions of property, of money, of profit or loss.

Both parties have a right to make the pills, and to advertise, puff, and sell them. Those who sell the most will make the most money; but in this competition for humbugging the public (if the pills are a humbug), the defendants have no right to deprive the plaintiffs of the reputation and customers which the plaintiffs' money has been the means of acquiring for the pills and themselves, and the expenditure of which money was in a great measure induced by the defendants themselves.

It does not appear that the pills are positively injurious; it is not to be believed that they have a tittle of the wonderful and benign curative or preventive capacity claimed for them in the eloquent pictorial advertisements of the parties; but it is not for the defendants to say the plaintiffs are humbugging the public, and are, therefore, not entitled to any relief against them, when the defendants have been and still are engaged in the same work.

As to the public—if these pills are an innocent humbug, by which both parties are trying to make money, I doubt whether it is my duty, on those questions of property, of right and wrong between the parties, to step outside of the case, and abridge the innocent individual liberty which all persons must be presumed to have, in common, of suffering themselves to be humbugged.

The injunction must be modified in accordance with this opinion, without costs to either party on this motion.

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him in the business, together with the "good-will" of the concern, to one Baker, and covenanted not to resume the same business in the city of New York without Baker's consent; that Baker thereupon commenced the same business at the same place, keeping up the old signs, and continuing to use the name of Howe upon the wagons and bread-tickets, the same as his predecessor had done; that Howe at first assented to this use of his name in Baker's business, but after the lapse of some time remonstrated in a friendly way against it; that subsequently, and shortly before the commencement of this suit, Howe, desiring to return to the business, bought of Baker the privilege of resuming the business at 850 Broadway, covenanting, however, in the agreement then made, "not in any manner to interfere with the business carried on at No. 432 Broadway, known as Howe's Bakery;" that, immediately after this agreement with Baker, Howe did resume his business of a baker at 850 Broadway, and has since continued the same there; that Baker afterwards sold out his lease, stock, wagons, fixtures, &c., used in the business at 432 Broadway, to Searing, the defendant in this action, conveying to him all the rights acquired by Baker by his purchase from Howe, subject to Howe's right to do business by virtue of the subsequent agreement alluded to; that afterwards the defendant continued the same business at the old stand, and also continued the use of the name of Howe on the signs, wagons, bread-tickets, &c., used in connection with the business at 432 Broadway. It was also proved, on the trial, that the use of Howe's name by the defendant, as stated, was calculated to mislead the public, and had induced persons to deal at 432 Broadway, under supposition that they were dealing with Howe, who would otherwise have dealt at Howe's place.

Judgment was rendered in favor of the plaintiff, and a decree was entered in the action restraining the defendant from in any manner using Howe's name in the business at 432 Broadway.

From this judgment the defendant appealed to the general term.

Luther R. Marsh, for the appellant.—I. The right to use Howe's name passed to Baker and his assigns, by the conveyance

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to Baker in the original agreement of the "good-will" of the concern.

II. By years of acquiescence in the use of the name by Baker, Howe has estopped himself from disputing the right of Baker's grantee to use it.

III. Howe's recognition of the premises as "Howe's Bakery," in his subsequent agreement with Baker, is conclusive evidence of what Howe understood had passed, and intended should pass, by the conveyance of "good-will."

Lawrence Worrall and *Moses Ely*, for the respondent.

BY THE COURT.—HOFFMAN, J.—The first, and the most important question in the cause is, what right passed to Baker, under the sale and transfer to him, in January, 1852, of the leasehold premises, stock, and trade, with "*the good-will of the business of baking, now or heretofore carried on by me in the city of New York.*"

The authorities referred to, do in general describe the good-will of a trade "as a probability that the old customers will resort to the old place." Judge Story describes it as "the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage which it receives from constant or habitual customers, on account of its local position or common celebrity or reputation for skill or affluence, or punctuality, or from accidental circumstances, or even from ancient partialities or prejudices." (*Story*, § 99.)

It is, I apprehend, a well-settled rule that the good-will of a partnership business does not survive to a continuing partner. It belongs to the firm as much as the ordinary stock in trade, and must be disposed of in some manner for the benefit of the firm. The case of *Lewis v. Langdon* (7 *Sim.*, 421), which seems to assert a different rule, is not the law of the court on this point, for which it is frequently cited. (*Story on Partnership*, § 99.)

But the decision turned upon the right to use the name of the old firm with a modification, and it is hereafter more particularly noticed.

Hammond v. Douglass (5 *Ves.*, 539), does indeed explicitly decide, that the good-will, speaking of it generally, does survive

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to the remaining partner; that a sale of it cannot be compelled by the representatives of the deceased partner; that it is not partnership stock of which the executor may compel a division, but belongs of right to the survivor.

In the case of *Dougherty a. Van Nostrand* (1 *Hoffm. Ch.*, 68), before me, as Assistant Vice-Chancellor, I thought that this case could not be supported.

I have acted at special term in this court on two cases, after a reconsideration of the point upon the same principle as in *Dougherty a. Van Nostrand*.

Vice-Chancellor Sandford, in *Williams a. Wilson* (4 *Sandf. Ch. R.*, 379), decided in the same manner, recognizing *Dougherty a. Van Nostrand*.

Good-will resolves itself into reputation. That, in the absence of proof to the contrary, or express agreement, must be presumed to have been the result of joint skill, capital, and industry, when built up by the parties themselves; or by a joint purchase, when it has been reared by a predecessor. As the acquisition was joint, the value must be shared.

Mr. Bell, in his Commentaries, observes (vol. 2, 645), that the good-will of a mercantile or literary establishment seems to form a part of the common stock.

He cites *Crawshay a. Collins* (15 *Ves.*, 227); *Cruttwell a. Lye* (17 *Ib.*, 335); *McCormick a. McCubben* (4 July, 1822, 1 *Shaw & B.*, 540).

Lord Eldon concurred in Sir Samuel Romilly's doubt as to the decision in *Hammond a. Douglass*; and that is equivalent to an express overruling it. It was Lord Eldon's manner of doing so.

In the late case of *McDonald a. Richardson* (1 *Giffard's R.*, 81), before Vice-Chancellor Stuart, this point seems to be taken for granted. A surviving partner had carried on the same business for some time after the death of his associate, and was called upon in the suit to account. The chief clerk was directed to ascertain the value of the testator's share of the good-will of the partnership business, among other things. The survivor was also executor, but it is plain this could not be the ground of a charge.

Chissum a. Dewes (5 *Russ.*, 29) settled, that the mortgagee of a lease, under which the business was carried on, was entitled

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to receive the avails of the sale of the lease and good-will. The latter constituted the chief part of the value.

The good-will of a trade, says TINDALL, Ch. J., in *Hitchcock v. Coker* (6 *Adolph & E.*, 438, 446), "is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. If the restriction as to time is held to be illegal, because extending beyond the period of the party carrying on the trade himself, the value of such good-will, considered in these various points of view, is altogether destroyed."

In *Elves v. Crofts* (10 *Com. B.*, 241, 1 *J. Scott*), a butcher assigned, for the residue of his term, premises in which he had carried on business, together with the fixtures and *good-will* of the trade. He covenanted that he would not, at any time thereafter, either by himself, or as agent or journeyman for another, set up or be employed in the trade or business of a butcher, within five miles from the premises assigned. It was held not an unreasonable restraint in respect either of time or distance, and that the covenant did not cease on the expiration of the term, or on the covenantee's ceasing, by himself or his assigns, to carry on the business assigned.

The court referred to *Hitchcock v. Coker* (*ut supra*), as decided in the Exchequer Chamber, and as settling that a restriction, reasonably limited as to space, but enduring for the life of the party restrained, was valid, as the only effectual mode of securing to the covenantee the full benefit of the good-will of his trade. "Cases may be conceived in which, notwithstanding the facts found by the jury, that the covenantee had ceased, either on the premises or elsewhere, or by any assignee or licensee to carry on the business, the good-will assigned might not be at once extinguished; and if consideration of time or degree be permitted to affect the right to enforce such a covenant, its value would be diminished, and the salable quality of the good-will, which, according to all the recent authorities, is deserving protection, would be affected."

It seems also to be well settled, that when a partnership is dissolved, and there is no express stipulation upon the subject, the remaining partners are not under any obligation to refrain from setting up the same trade or business, and forming a new establishment for carrying on the same, after the sale of the late

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business. The Master of the Rolls stated this rule in *Davies a. Hodgson* (25 *Beav.*, 177), referring to *Cook a. Collingridge*, as reported by Mr. Collyer, § 322.

The first decree in that case is found in Jacobs' Report, 623, and Mr. Collyer gives the directions of Lord Eldon, drawn by himself upon a petition for further carrying out the decree.

These points may be deduced from the minute provisions of this decree.

A partnership having terminated by lapse of time, there was nothing to prevent some of the members forming a new establishment to carry on the same business. That the good-will, treated as the value of the chance of customers continuing to deal, could not be estimated upon the same principles, as when a retiring partner sold his whole interest to continuing partners, and retired from the trade altogether. A buyer of the premises, the leasehold, shop, &c., would purchase something which could not be treated as of no speculative value, or not to be regarded in the sale. He would get the chance of retaining the old customers—getting them to come to the old place; but this chance, and therefore the value, would be materially affected by the probability of the customers following the former members to their new establishment.

Nothing is found in this case as to the former name by continuing partners, in any form, whether modified or not.

In *Lewis a. Langdon* (7 *Sim.*, 421), before noticed, Stephen Brookman and Joshua Langdon carried on business under the firm of Brookman & Langdon. Brookman died, and then Langdon died; the latter appointing William Langdon his executor and residuary legatee. He died, and administration was granted to Fruzan Langdon, his widow. The business was carried on at the same place, and under the same firm-name, by Joshua Langdon, William Langdon, and Fruzan Langdon in succession; Fruzan Langdon took the plaintiff (Lewis) into partnership. Fruzan Langdon then died, having appointed Augustus Langdon and two others her executors. James Lewis then took the plaintiff (Warren) into partnership, and they carried on the business at a different place from the original location, under the firm of James Lewis & Co., successors to Brookman & Langdon. The bill was to restrain them from using that name in the busi-

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ness. There was an agreement in the case, which does not seem to me of much importance on the main question.

The Vice-Chancellor said: "I cannot but think, when two partners carry on a business together, under a given name, that, during the partnership, it is the joint right of them both to carry on the business under that name, and that, upon the death of one of them, the right which they before had jointly, becomes the separate right of the survivor."

It is to be observed, upon this case, that the defendant had not a shadow of right to the use of the firm-name. The plaintiff had the right, so far as any existed in Joshua Langdon, as survivor of Brookman & Langdon. Had a representative of Brookman been defendant, the question would have distinctly arisen.

In Clinton and others *v.* Douglass (1 *H. R. V. Johns.*, 176), before Vice-Chancellor Wood, 1859, the business had been carried on for some time under the firm-name of John Douglass & Co. By a written instrument, the defendant sold to the plaintiff "all his shares, rights, and interests in the trade or business carried on by him and the plaintiffs at Bradford, in co-partnership, and under the firm of John Douglass & Co., and the good-will thereof." Other and comprehensive words were used to transfer the whole of the partnership goods and property, and the assignor's title therein. The defendant also leased to the plaintiff, for seven years, the premises at which the business had been carried on.

Notice of the dissolution of the old firm was given, and the style of the new firm was Clinton, Bankhart & Huet (late John Douglass & Co.)

The location of the old business was at Hall Jugs, Bradford. The defendant subsequently opened a store for the same business, next door to that of the plaintiff leased by him, and placarded it with the name of John Douglass & Co. An injunction was granted, restraining the defendant, until the hearing of the cause, "from resuming or carrying on the business of stuff-merchant, at or about the immediate neighborhood of Bradford, either alone or in partnership with any other person, under the style or firm of John Douglass & Co.; or in any other manner, holding out that he is carrying on the business of stuff-merchant, in continuation of or in succession to the business carried on by the late firm of John Douglass & Co."

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The Vice-Chancellor enters into a very elaborate argument in the case. He holds expressly that the authorities are conclusive to the point, that the sale of the good-will of a business without more, does not imply a contract on the part of the vendor, not to set up a similar business himself. Upon a sale of the good-will, the vendor is not precluded from carrying on a precisely similar business, with all the advantages from his own labor and industry, and from the regard people may have for him; and that, in a place next door, for example, to the very place where his former business was carried on.

But he also held, that the name of a firm—that style under which its business has been carried on, is part of the good-will and passes with a sale. “The name of a firm is a very important part of the good-will of the business carried on by the firm. A person, says, I have always bought good articles at such a place of business; I know it by that name, and I send to the house of business identified by that name for that purpose. That the name is an important part of the good-will of a business is obvious, when we consider that there are at this moment large banking-houses, and brewing-firms, and others in this metropolis, which do not contain a single member of the individual name exposed in the firm.”

The defendant “parted with the right to the plaintiff of representing themselves to be carrying on the identical business, which had been carried on by the firm of John Douglass & Co. But they did not get the right to call themselves by that name *simpliciter*. This they had not claimed, but only to use the words, ‘late John Douglass & Co.’; in other words, the right to identify their house of business as the house of business formerly carried on by *John Douglass and Company*. That name had become well known. The business was identified by that name. It is not as if he were calling himself *John Douglass* alone, and carrying on a similar business under that name.”

The judgment in *Cruttwell a. Lye* (17 *Ves.*, 346), distinctly admits, that, although you may set up a similar business, you are not entitled; when you have sold the good-will of the business to represent that you are continuing the *identical* business; not to say that you are the owner of that which you have sold. The defendant has not contracted against setting up business in opposition to the business sold by him to the plaintiff; but he

must set it up fairly and distinctly as a separate business, and not as the old-established business which he has sold.

I have quoted largely from this case, as none other that I am aware of has entered so fully into the subject.

In *Cruttwell v. Lye*, referred to (17 *Ves.*, 346), Lord Eldon said: "The question is whether, upon a fair understanding or representation agreeably to the fact, this person is carrying on the plaintiff's trade, and in this view of the case I refer to *Hogg v. Kirby* (8 *Ves.*, 215), where the defendant had a clear right to publish a similar work, under the same title, as the plaintiffs, represented as distinct and original, but was prevented from publishing his book as the work of the plaintiff which had been partly published. So there can be no doubt that this court would interpose against that sort of fraud which is attempted by setting up the same trade, in the same place, under the same sign or name, the party giving himself out as the same person."

The law of France, in relation at least to commercial partnerships, is very explicit upon this subject. The 21st article of the Code of Commerce is, "The name of the associates can alone constitute the firm-name (*la raison sociale*). This is intended to forbid persons who succeed to the business of a deceased merchant from continuing it under his name. Credit is altogether personal. It does not transmit itself by cession or inheritance. It is won by actions and capacity. It is not right then that a successor should avail himself of a fallacious credit in appropriating a firm's name extinguished by the death of one of those who gave it the value. (*Troplong: le Droit Civil*, tome 12, § 372. *Loi sur l'Article 21 of the Code of Commerce*.)

M. Troplong adds, "One is astonished that such a contrary practice prevailed formerly in France, and exists in England. It is a source of fraud upon a confiding public. The retirement or decease of one of the associates effaces the firm's name. Another must be created."

Thus does the case stand upon all the authorities that I have found bearing upon it; and it would leave it without any direct authority, or even dictum, in favor of the defendant, except that late and important case before Vice-Chancellor Wood.

But it is to be noticed, that by a statute of our State, entitled "An Act to prevent persons from transacting business under fictitious names," passed April 29, 1833 (*Laws of 1833*, ch.

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281), it is enacted, that, "No person shall hereafter transact business in the name of a partner (*quere*, person) not interested in his firm;" and where the designation "and Company," or "Co.," is used, it "shall represent an actual partner or partners." By section 2, the violation of this provision is made a misdemeanor.

By a statute passed April the 17th, 1854 (*Laws of 1854*, ch. 400), a co-partnership name may be continued by some or any of the co-partners, their assignees, or appointees, provided a certificate as prescribed by the act, is filed in the county clerk's office, and published as directed. But by section 4 the provisions are only to apply to firms having business relations with foreign countries. A bill to extend this provision is now before the Legislature.

It seems to me, that the principle and object of this statute extends to such a case as the one before us. It recognizes the principle as one of public policy, that the business must be transacted under the name of the actual parties doing it, and not under other names. It applies to persons in existence, as well as when a partner has retired or is dead. It accords with the French law, and involves or warrants the proposition, that the naked sale of the good-will of a business does not transfer a right to the use of the vendor's name of trade.

We do not think that there is any thing in Howe's inaction or the employment of the term of Howe's Bakery, in the instrument of the 28th day of April, 1858, which can entitle the defendants to use the name.

The judgment below must be affirmed, with costs.

PIERREPONT, J.—Concurred.

MONCRIEF, J., dissenting.—Whether or not the term "*good-will*," under all circumstances, includes the name under which the business originated or was continued, or became a thing of specific value, is not in the present instance necessary to determine.

A person not a lawyer would not imagine that when the "good-will" and trade of a retail shop were sold, the vendor might the next day set up a shop within a few doors, and draw off all the customers. The "good-will" of such a shop, in good

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faith and understanding, must mean all the benefit of the trade, and not merely a benefit of which the vendor might the next day deprive the vendee. This was the language used by the Vice-Chancellor, in 2 Madd. Ch. R., 188, 219, in which the decision of Lord Eldon (17 Ves., 346) was cited, and in reply to the proposition there laid down, "that good-will was the probability that the old customers will resort to the old place."

(This clearly will not be applicable to the present case, as the transfer of the lease, without the additional provision in the agreement for the sale of the good-will, fully and practically secured the old stand, with whatever probabilities were incident to it.)

Story defines "good-will" to be the advantage or benefit acquired by an establishment, beyond the mere capital or value of its stock, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill and affluence, or punctuality, or from the accidental circumstances or necessities, or even from ancient partialities or prejudices.

Courts of equity are frequently called upon to interpose and prevent a person from using *the name* of another in a business or concern, for the fraudulent purpose of imposing on the public, and supplanting the other in the *good-will* of his concern. (3 Kent, 5th ed., 64, note; 2 Kern., 313; 6 Beavan, 72; 8 Paige, 75; 4 Ib., 479; 2 Barb. Ch. R., 101; 2 Sandf. Ch. R., 617; affirming, Taylor *v.* Carpenter, per Spencer, Senator.)

The plaintiff adopted, appropriated, and used the words or name "Howe's Bakery," and by that name his establishment became known, and was extensively patronized, and was a thing having specific value. The plaintiff so avers in his complaint.

If the plaintiff, previous to the transfer, in 1852, to Baker, the assignor of the defendant, had sought the aid of equity to restrain a person, of the same surname, engaged in the same business in the city of New York, from using the words "Howe's Bakery," the claim would have rested not upon any exclusive right of the plaintiff to appropriate and monopolize these words, the one being peculiar to neither, and truthful as to both, and the other a generic term not capable of appropriation, but that

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the words had been long used by him, and had become known as indicating articles manufactured or made at, or vended from his establishment or place of business. The ground of interposition is, that a name having been taken for the purpose of distinguishing property, the defendant is not permitted on the false representation that articles, really the defendant's, belong to or were made or sold under the management of the plaintiff, or came from his place of business, thereby depriving the plaintiff of the fair profits of his business.

The name or words "Howe's Bakery" was nothing but a trade-mark, and, as such, is now sought to be protected by the plaintiff.

The name or trade-mark passed by the assignment and transfer of the "*good-will*," and if it was not the thing itself, it was an integral part of it.

The contract of the parties leaves no room for conjecture as to their intention.

The stock in trade, fixtures, &c., were specifically mentioned; the leases were distinctly set forth; the art and mystery of the business was provided for by an express covenant, to teach whomsoever the vendee might select; and lastly, not least, after agreeing for the sale of the "*good-will*," it was stipulated that the vendor (plaintiff) should not directly or indirectly engage or be concerned in the same business in the city of New York, without the consent of the vendee (Baker).

Again, this clear understanding of the parties, and this construction of their agreement, is definitively fixed by the long acquiescence of the vendor, and by his requesting and obtaining leave to commence the business at a particular place, and use the name within those bounds.

It seems to me the statute has no application to the case under consideration; the title clearly indicates the intent to prevent mischief by the use of a fraudulent, because entirely fictitious designation, the word "Co.," with no physical existence to represent it.

The name "Howe" had a living physical existence to support it. It was not, therefore, fictitious.

The name "Howe" required nothing to sustain it. As a trade-mark, it is immaterial whether it was the name of animate or inanimate creation, or the purest effort of fancy on the part of

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its originator; possibly the more original in its character, the better would be the protection offered to it—the nearer it approach to the right to be patented. The plaintiff cannot avail himself of the statute, even if it did apply. Having agreed to dispose, and actually conveying the thing alleged to be prohibited, it does not lie with him to complain of his own violation of law, or a fraudulent representation to his vendee.

No such point was taken by the plaintiff upon the argument of the appeal.

The plaintiff might dispose of his credit. That is nothing more than a reputable name or character, and its influence.

The injunction should have been refused, and the complaint dismissed.

The judgment of the special term should be reversed, &c.

BAKER *a.* CURTIS.

Supreme Court, First District; Special Term, March, 1860.

BAIL.—SURRENDER.—EXONERATUR.

After the twenty days limited by section 191 of the Code has expired, the bail cannot properly surrender his principal, nor if he does can the sheriff hold him. Of the cases in which the time may be extended, or an omission to surrender within the time may be excused.

This was an action against defendants as bail, commenced on the 12th day of November, 1855. Defendant Curtis answered on the merits, but omitted to apply for any extension of time in which to surrender his principal, Vandoler, until after the twenty days allowed for that purpose by section 191 of the Code had expired.

On the 7th day of January, 1860, he surrendered his principal to the sheriff, and on such surrender moved to be exonerated as bail, on payment of the costs of the suit.

He also showed diligence in arresting his principal, whom he had brought all the way from St. Louis to New York, and of whom he had been in constant pursuit since the suit was begun.

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Before the return-day of the motion, defendant Vandoler sued out a writ of *habeas corpus*, and demanded his discharge, on the ground that the sheriff had no right to hold him, and his bail no right to surrender him after the twenty days had expired, unless the time had been extended by order of the court, made before the twenty days had run out.

Both motions were argued together before Judge Sutherland, who, after a thorough examination of the question, and a consultation with his brethren of the First District, held, that the prisoner was entitled to his discharge on the ground claimed, and that therefore, as there had been no valid surrender, the motion for exoneration must be denied.

Defendant Curtis then moved, at special term, before W. F. Allen, J., for leave to make a surrender of his principal, although the time had expired, and on such surrender to be exonerated.

William W. Badger, for plaintiff.

A. J. Vanderpoel, for sheriff and bail.

John Cook, for the prisoner.

ALLEN, J.—The defendant Curtis became absolutely fixed as the bail of Vandoler by the failure of the latter to comply with the undertaking given on his arrest, and the omission of the bail to surrender his principal within twenty days after the commencement of the action against him. (*Code*, §§ 187, 191.) The time for the surrender of the principal might, upon good cause shown, have been extended by the court at any time during the twenty days allowed *ex gratia* for the surrender; and probably after the lapse of that time a surrender might be permitted upon a clear case being made, which would have entitled the bail to an enlargement of the time, a proper excuse being made for not applying within the proper time. (Thomas *a.* Bulkley, 5 *Cow.*, 25; Gilbert *a.* Bulkley, 1 *Duer*, 668.) Sickness of principal or bail would be a good reason for enlarging the time. (Thomas *a.* Bulkley, 5 *Cow.*, 25; Boardman *a.* Hunt, 1 *Johns. Cas.*, 413.) The sickness would be a circumstance beyond the control of the bail. A mistake of law or fact on the part of the principal would not necessarily excuse the delay—

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e. g., a mistake in the return-day of the *capias* in the action against the bail, and by which the time for the surrender was limited. (Rathbone v. Warren, 4 Johns., 310.) In Seaman v. Drake (1 Caines, 9), the bail were absolutely entitled to an exoneration at the time they became fixed, and the legal right was not lost by their delay.

In this case the affidavit of the bail is unsatisfactory. It does not give a single date, or state what means the bail took at any time to ascertain where his principal was, and to effect his surrender. The statements, without date or time are very general, and the defendant contents himself with stating generally that he used the utmost exertions to effect the surrender. He should have stated what he did, and when he did it, and the court would then decide whether he did all that he was called upon to do. So far from excusing the delay, he shows absolute laches, and a voluntary sufferance to the defendant in the principal action to go without the State. After the judgment in the original action, and probably after the receipt of the letter from the plaintiffs' attorney, stating that he would be held to his liability as bail, he went to Rochester and had an interview with the principal, and did not arrest him, but took him prisoner to surrender himself. This he did upon his own responsibility, and at his peril, and by it took his chances for effecting the surrender before he should become fixed *de jure*. (Olcott v. Lilly, 4 Johns., 407.) The case looks as if the bail and principal might have acted in concert, and after the defendant in the original action had been at large until his interests were secure, and he was ready to take up his residence in New York, they for the first time set about yielding to the claims of the plaintiff. But be this as it may, the delay is not excused, and motion must be denied, with costs.

GORSLINE'S CASE.

Supreme Court, First District; At Chambers, April, 1860.

CRIMINAL LAW.—HABEAS CORPUS.—BAIL.

One who is arrested in one county under a bench-warrant duly issued on an indictment in another county, cannot be let to bail in the former county; he must first be carried to the county whence the warrant issued.

It is only a prisoner who has been committed that can be bailed on habeas corpus, under 2 Revised Statutes, 568, § 43. One who is merely held under arrest to be carried to the county where he is to be committed, cannot be so let to bail.

Habeas corpus.

BONNEY, J.—James M. Gorsline is brought before me on habeas corpus, with a return, showing that he had been arrested and is detained under a bench-warrant, dated 24th March, 1860, issued by the county judge of Fulton county, by which the officer is commanded to take this party, indicted in Fulton county Court of Sessions, for obtaining goods under false pretences, and bring him before said court, at the court-house in said county, if in session; and if not in session, to deliver him to the keeper of Fulton county jail, to be kept until discharged by due course of law. The warrant is duly indorsed by one of the police-justices of the city of New York.

It is conceded that this warrant is in due form and regularly issued; but the counsel for the prisoner moves that he be discharged on bail, which he proposes to give in such amount as shall be required; and I am called upon to decide as to the power of a justice of the Supreme Court, in this city, to let this party to bail, after his arrest under said bench-warrant, and before he has been taken to Fulton county.

The Revised Statutes, in relation to this question, provide as follows (2 *Rev. Stat.*, 677, § 53; *Laws of* 1851, ch. 144; same statutes, 3 *Rev. Stat.*, 5th ed., 956, § 55): That the punishment for the offence of obtaining goods by false pretences shall be imprisonment in a state-prison not exceeding three years, or in a county jail not exceeding one year, or fine, or both such fine and imprisonment. (2 *Rev. Stat.*, 728, § 55; *Laws of* 1847, ch. 338;

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Laws of 1830, ch. 300, § 62; same statutes, 3 *Rev Stat.*, 5th ed., 1020, §§ 57, 58.) That a warrant for the arrest of any defendant indicted, may be issued by the court to which such indictment shall be presented, or any judge of the county courts in that county, &c., directed to the sheriff and constables of any county in this State, and when served in any county other than that in which the indictment shall have been found, the same proceedings shall be had as on an indorsed warrant issued before the indictment, as subscribed by statute. (2 *Rev. Stat.*, 707, §§ 4 and 5; same statutes, 5th ed., Vol. III., 993.) That if the person against whom such warrant before indictment is issued, shall escape, or be in any other county, it shall be the duty of certain magistrates referred to (including justices of the police courts in New York), within the county where such offender shall be, on proof of the handwriting of the officer subscribing the warrant, to indorse his name on the same, and thereupon the person bringing the warrant, or any other officer to whom it may have been directed, may arrest the offender in the county where the warrant was indorsed. (2 *Rev. Stat.*, 708, §§ 11 and 12; *Laws of 1845*, ch. 180, § 26; *Laws of 1847*, ch. 455, § 13; same statutes, 3 *Rev. Stat.*, 5th ed., 994, §§ 11, 12.) That if the offence charged in the warrant be punishable with death, or with imprisonment in a state-prison, the officer making the arrest shall convey the prisoner to the county where the warrant was originally issued, before some magistrate thereof, as in the statute prescribed; and that persons arrested under any warrant issued for any offence, shall, where no provision is otherwise made, be brought before the magistrate who issued the warrant; or, if he be absent, or his office be vacant, before the nearest magistrate in the same county, and the warrant, with a proper return, shall be delivered to such magistrate.

By these statutes, the officer who arrested Gorsline is clearly authorized and required to take him to Fulton county; and no justice of the Supreme Court, or other magistrate or officer out of that county, has authority, in my opinion, to take bail for his appearance, and discharge him from custody. The case of *Clark v. Cleveland* (6 *Hill*, 344), is authority for this decision.

It is urged, however, that under the habeas corpus act (2 *Rev. Stat.*, 568, § 43; same statute, 5th ed., Vol. III., 883, § 58), this prisoner should now be let to bail. That section provides for a

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case *where the party has been committed*. Gorsline has not yet been committed, but is held under arrest by virtue of process, which requires that he be taken to Fulton County, where he may be committed, let to bail, or discharged according to law.

The writ of habeas corpus is discharged, and the prisoner remanded to the custody of the officer holding the bench-warrant.

MINOR *a.* WEBB.

Supreme Court, First District; Special Term, April, 1860.

INJUNCTION.—AMENDMENT.

An injunction is not the proper remedy to restrain a multiplicity of suits. An amendment of an injunction extending it to the agents and attorneys of the party, should not be allowed if the injunction should not have been granted originally.

Motion for amendment of injunction.

The facts are stated in the opinion.

JAMES, J.—This motion asks for an order directing an amendment to the original injunction-order granted in the action by inserting therein the words, “their agents or attorneys,” so as to extend the operation of the injunction to the agents or attorneys of the parties.

The facts are in substance as follows: Some years since, Webb made an assignment to Minor, in trust for the benefit of creditors, giving preferences. Minor accepted the trust, and after notice to the creditors, converted the assigned property into money, which he still controls. Several creditors obtained judgment against Webb, and commenced actions in different courts, some against Minor and Webb, and some against Minor alone, to set aside the said assignment, as fraudulent and void. Several of said cases were referred, and on the report of the referee, judgments were obtained therein declaring said assignments void, &c. At this stage, the present

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action was commenced by Minor, wherein are included, as defendants, the assignor Webb and all his creditors, including the plaintiffs in the several judgments hereinbefore mentioned, praying for a judicial construction of said assignment, that the same may be declared legal and valid, that the creditors of Webb may be required to come in, prove and substantiate their claims under it, and that, in the mean time and until the final determination of said action, all *parties named as defendants*, be restrained from commencing or further prosecuting any suits touching said assignment. An injunction-order restraining the defendants was obtained and served. Afterwards, the plaintiff herein moved, in several of the other actions, and procured the judgments entered therein to be opened, permitting the defendants to put in an amended answer, and directing a retrial before the referee. Amended answers have since been put in—the causes are now at issue on such answers, and having been noticed for hearing before the said referee by the attorneys of the several parties, the plaintiff Minor asks this amendment to the original injunction, in order to stay the attorneys from proceeding with the trial of the several actions before the referee.

It is urged that since the commencement of this action the injunction has been waived by the acts of the plaintiff, by himself proceeding in the other actions and producing a change in their condition, and that the other parties to those actions are at liberty to proceed, notwithstanding said injunction, to the trial of the new issues thus forced into the said causes, and should not be restrained by a new injunction, nor should they by any recognition of the validity of the old one by amendment or otherwise. How this may be I do not now propose to discuss.

It is certain, however, that the amendment ought not to be allowed, unless the injunction was proper in the first instance, nor unless one would be allowed if now for the first time applied for. The Code having conferred legal and equitable jurisdiction upon the same courts, abolished the distinction between legal and equitable remedies, allowed equitable defences, and authorized affirmative relief to a defendant, there now exists no necessity for an injunction in one case to stay the proceedings in another. All that relates to the same subject-matter in litigation, may now be tried and disposed of in the same action, which should be in the action first commenced.

As a general rule, an injunction in one suit to restrain proceedings in another suit, either in the same court, or in another court having equal power to grant the relief sought, will no longer be granted. Such is clearly the spirit of the Code, and such the construction heretofore given it by the courts. (Bennett *a.* Lee, 14 *How. Pr. R.*, 178; Arndt *a.* Williams, 16 *Ib.*, 244; Winfield *a.* Baker, 24 *Barb.*, 154; Dedereik *a.* Haystadt, 4 *How. Pr. R.*, 350; Hunt *a.* Farmers' Loan, 8 *Ib.*, 416; Grant *a.* Quick, 5 *Duer*, 612.) Whenever the commencement or pending of one suit furnishes a reason for staying proceedings in another suit, an application should be made in the suit sought to be stayed. (See authorities above cited.)

I do not think this omnibus bill should be made an exception to the general rule. The New Haven Railroad case, cited by the plaintiff's counsel, has no bearing upon this question, because it does not appear in that case that any actions had been previously commenced by the defendants, or any of them, which were restrained, or that an injunction was ever issued in that case. That such an omnibus bill is appropriate and often necessary, cannot be disputed; and an injunction to restrain the parties from commencing other actions respecting the same subject-matter involved, is equally appropriate, but not the right to restrain proceedings in actions previously commenced.

The plaintiffs in the other actions commenced against Minor, by those actions have obtained a lien upon the assigned fund, if the assignment can be broken up, which entitles them to a preference over other more tardy creditors; and they should be permitted to proceed in the prosecution of their action, without regard to the wishes or convenience of the assignee of the alleged fraudulent assignment. Every matter set up in this omnibus bill, may be interposed as a defence in the other actions—and being first commenced, they should not be retarded to await the slow process of this action, incumbered as it is with numerous defendants having a separate defence.

In this view of the case, an original injunction, if now asked for, would not be granted, and hence the amendment should not be allowed.

Motion denied, with \$10 costs.

EHLE a. HULLER.

New York Superior Court ; General Term, January, 1860.

JOINDER OF CAUSES OF ACTION.—PLEADING.—ORDERS.—
APPEAL.

The omission of defendant's attorneys to subscribe a demurrer cannot be raised on appeal from an order sustaining the demurrer.

On appeal from an order, the court will not go behind the order as entered and appealed from, to consider the objection that it was not in accordance with the minutes of the court.

A complaint setting forth several causes of action, such as cannot properly be united, and demanding damages generally on account of them, cannot be sustained on the ground that the facts alleged in some of the facts were proper matter of inducement to others, which constituted but one cause of action.

Appeal from order sustaining demurrer to complaint.

The nature of the complaint sufficiently appears in the opinion. The demurrer was on the ground of a misjoinder of causes of action. The demurrer was sustained at special term by Mr. Justice Pierrepont, and the defendant appealed.

BOSWORTH, J.—The objection that the demurrer was not signed by the party (defendant), nor by Tabor & Reavy, as his attorneys, is not a ground of reversal of the order. If the paper was defective, it should have been returned to those who sent it, with a memorandum of the defect, to the end that it could be corrected. Again, the objection should have been made and passed upon at special term. The persons whose names are signed were and are attorneys of this court, and as such appeared and argued the demurrer below, so far as the order of proceedings furnished by the papers upon this appeal inform me, without any objection being made.

The suggestion that the decision of the court below was entered in the minutes of the clerk, differing in terms from the order appealed from, may be dismissed, with the remark that

this court cannot go behind the order as entered and appealed from. If the order did not conform to the decision of the justice, application might have been made to resettle, and, if erroneous, correct it.

The complaint, after setting forth a contract to sell certain lands under date of 26th of January, 1859, alleges :

1. That 'the defendant caused certain fixtures, parts of partitions, and a second floor, to be severed and removed from the premises, which were a part of the real estate sold, and to be conveyed, to the plaintiff.

2. That defendant proceeded to occupy the store in said premises as a workshop, and for the purpose of shoeing horses ; by means whereof the said property and the premises were damaged, and of less value to the plaintiff.

3. That the defendant let and rented the whole upper part of the house, and received the rent thereof, in violation of said articles of agreement.

4. That the defendant prevented, hindered, and deprived plaintiff of the benefits of the said property and premises aforesaid, in violation of said articles of agreement.

5. That the defendant prevented the plaintiff from proceeding to build a house on said premises, in violation of said articles of agreement.

The plaintiff in person contends that the foregoing averments are proper and necessary in sustaining the cause of action founded upon the allegation that the defendant on the night of the 14th of February, 1859, committed a violent *assault* on the person of the plaintiff, and took from him the aforesaid agreement.

If any, the only proper inducement in an action of assault and battery, under the former system of pleading, was an averment of the right of personal security, &c., but it was thought none was necessary, in 1 Chitty on Pleading, 411.

The Code has so far changed pleadings as to enable a party to state the whole of any one transaction, out of or upon which the right of action proceeded. (So held by HARRIS, J., in *Brewer v. Temple*, 15 *How. Pr. R.*, 287, where the demurrer to a complaint averring slander and assault and battery occurring at the same time was overruled.)

The matters alleged in the present complaint, however, are

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not the history of one occurrence, and no more. It is a narrative of several separate and distinct matters, occurring at different times, and constituting several distinct causes of action, or several distinct breaches in a cause of action.

The plaintiff avers that "by means of the wrongful acts of the defendant in the premises, as aforesaid, the plaintiff has sustained damage to the amount of two thousand dollars," and asks judgment for those damages.

The prayer of the complaint, therefore, has equal reference to all the matters set forth, and would permit the plaintiff to recover, upon proving either of them,—the breach of the contract to convey the removal of part of the property under the contract, that the defendant let and rented the whole upper part of the house, and received the use thereof, or the assault and battery.

Such causes of action, in my opinion, cannot be united, they are not all parts of one transaction, nor are they of the same family, belonging to any one specified class. (6 *How. Pr. R.*, 514; *Ib.*, 170; 8 *Ib.*, 470.)

The complaint, improperly uniting several distinct causes of action, was the subject of demurrer. (§ 144, amended Code.) The decision at the special term, therefore, was correct, and the order appealed from should be affirmed, with costs.

MAYHEW *a.* WILSON.

Supreme Court, First District; At Chambers, February, 1860.

ATTACHMENT.—SHERIFF'S FEES AND COMMISSIONS.

A sheriff is entitled to the same expenses and commissions upon things in action taken on attachment under the Code, and collected by him, as trustees of insolvent debtors in attachment, &c., under 2 Revised Statutes, 46, § 29.

He must specify the items of expenses under oath, of himself or of the deputy who paid them.

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Adjustment of sheriff's fees on attachment issued as a provisional remedy under the Code of Procedure.

The facts are stated in the opinion.

LEONARD, J.—The sheriff of the city of New York, in 1856, received warrants of attachment against the said defendants in four actions, under which he levied on certain books of account, belonging to the defendants, and thereby ascertained the names of over thirty persons who were dealers with the defendants, and then indebted to them in amounts varying from \$5 to about \$250, the most of the demands being, however, under \$100 each. The deputy, who had charge of the process, employed as his agent a person who occupied the same place of business with the defendants, and who was engaged in the same business, and possessed other facilities for more readily and conveniently collecting these book-demands than the deputy. The attorneys in the second and third attachments consented to the employment of the agent, and to the rate of compensation to be paid to him by the sheriff, which was fixed at five per cent.

The first three attachments have been discharged, and a small sum remains in the sheriff's hands applicable to the fourth attachment, which would be considerably increased if the five per cent. which the sheriff agreed to pay to his agent for collecting the demands which were attached, should be disallowed. And the counsel for the plaintiff in the fourth attachment opposes the allowance of this percentage to the sheriff as an improper or excessive expenditure for the agency or services of another to perform duties which the law has imposed, as the plaintiff alleges, on the sheriff himself. That application is the question principally to be considered.

By the Code, under which these attachments issue, section 232, the sheriff is authorized to take such legal proceedings for the collection of the debts and credits of the defendants as may be necessary, either in his own name or in the name of the defendant.

Under section 237, subdivision 4, the sheriff is to proceed to collect the notes and other evidences of debt, &c., and apply the proceeds to the payment of the judgment, in case judgment

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has been entered for the plaintiff. And the court is authorized, on the sheriff showing that he has used diligence, and endeavored to collect the evidences of debt so attached, and that a portion remains uncollected, to order the sheriff to sell the same.

And further, showing that it was not contemplated by the Code that the sheriff should personally collect in all cases the evidences of debt which he should attach, it is provided, by section 238, that actions authorized to be brought by the sheriff, may be prosecuted by the plaintiff upon delivering to the sheriff an undertaking with two sureties to indemnify him from all damages, costs, and expenses on account thereof, not exceeding \$250 in any one action. Section 243 provides that the sheriff shall be entitled to the same fees and compensation for his services, and the same disbursements, as are allowed for *the like services* and disbursements under chapter 5, title 1, part 2, of the Revised Statutes.

The compensation to sheriffs, for services, &c., under that chapter of the Revised Statutes (relating to attachments against concealed, absconding, and non-resident debtors), is regulated under chapter 10, title 3, part 3, and in addition to certain fees and poundage, specifically fixed, the sheriff is thereby authorized to receive such compensation for his trouble and expenses in taking possession of, and preserving the property attached, as the officer issuing the attachment shall certify to be reasonable.

It is manifestly just that the sheriff should have a suitable compensation for such services as he has rendered in these actions, and the rate which was agreed on by the attorneys, in the second and third attachments herein, does not appear unreasonable under the circumstances. It is the same commission that collecting agents are commonly allowed, in this city, except under particular circumstances, when agents receive sometimes a larger and sometimes a smaller commission, varying by agreement, or according to the difficulty of the service.

Under the statutory fees to sheriffs, above referred to, the authority to afford compensation for collecting the book-accounts and debts under these attachments, must be included, if it exists at all, by that fee-bill, under the language above quoted from chapter 10, authorizing the officer issuing the warrant, to certify

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additional compensation for trouble and expenses in taking possession of and preserving the property attached.

In these cases, however, the sheriff took possession of books of account and debts only, and the expense and trouble of rendering that service, and of afterwards preserving them, does not appear to be very great.

It would be a very great straining of this language to allege that it includes the trouble or expense of collecting debts. This conclusion is still stronger, when we refer to the duties required of the sheriff, under chapter 5, title 1, part 2, none of which consist in collecting debts due to the creditor in the attachment; and of course the sheriff's fee-bill for services or expenses under this chapter, contains no provision for services or expenses which he is not by law required to perform.

New duties and obligations have been imposed upon the sheriff, by the attachment authorized by the Code, for which no fees had been theretofore provided, because there were no such duties or obligations existing; and unless we can find a proper compensation in some other provision of law, it must be attributed to a legislative oversight. But such is not the case. The Code (§ 243) provides the adequate compensation required.

It seems to have been assumed, by the counsel who argued this application, that the measure of the sheriff's compensation was, by section 243, to be fixed under the provisions of chapter 10, title 3, part 3, regulating the fees of sheriffs.

The provisions of the Code (§ 243) are, that the sheriff shall be entitled to the same fees and compensation for services, and the same disbursements, as are allowed by law for like services and disbursements, under chapter 5, title 1, part 2, of Revised Statutes. Allowed to whom? Not to sheriffs only. Section 243 does not say that. But such as are *allowed* under chapter 5, title 1, part 2, of the Revised Statutes. This includes such fees, compensation, and disbursements, as are allowed to any officer by that chapter, for such services as the sheriff is now required to perform, under the provisions of the Code respecting attachments.

Referring again to the chapter of the Revised Statutes respecting attachments, we find that the law required trustees of the estate of the debtor which the sheriff attached, to be appointed, and these trustees were authorized to collect accounts and debts

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due to the debtor in the attachment. These duties, under the attachment which the Code has provided, now devolve on the sheriff. The sheriff is required by the Code to collect the debts due to the debtor in the attachment, and he is entitled to the same measure of compensation which the Revised Statutes, by chapter 5, title 1, part 2, award to trustees for like services. The compensation to trustees by that chapter (2 *Rev. Stat.*, 46, § 29, 1st ed.) is, all necessary disbursements, and a commission of five per cent. on all money which comes into their hands.

The claim of the sheriff in these cases is for like services, &c., performed by trustees under the attachment of the Revised Statutes, and he is entitled to the same fees, &c., as are allowed to such trustees. If the sheriff chooses to employ agents to aid him in collecting debts, which he could himself collect without resort to an action, or the employment of attorneys or counsel, he must himself compensate his agent, unless an agreement is made by him with all parties interested in the proceeds. I do not doubt that he may employ attorneys and counsel, and prosecute actions, and that he is entitled to be paid for the necessary disbursements therefor, in the same manner that such disbursements were allowed to trustees under the attachment authorized by the Revised Statutes, whether the action be successful or not, if it be prosecuted in good faith. (12 *Wend.*, 390, in the *Matter of Bunch*, a non-resident, &c.)

If the sheriff claims for disbursements expended by him for protests, necessary travelling expenses of himself, or his agents, they are allowable; but he must specify the nature of the expenditure, item by item—and these items he must verify by the oath of himself, or the deputy who paid or incurred the same, or the claim therefor must be disallowed.

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THE PEOPLE *on rel.* DOYLE *a.* JOHNSTON.

*New York Common Pleas; Before Hon. Charles P. Daly, F. J.,
April, 1860.*

CRIMINAL LAW.—RECOGNIZANCE TO APPEAR AT SPECIAL SESSIONS.

The Court of Special Sessions have no jurisdiction of a prisoner who, on his committal, entered into recognizance to appear at the General Sessions.

Habeas corpus.

DALY, F. J.—Under the Revised Statutes (2 *Rev. Stat.*, 889, 4th ed., § 24), a party accused of petit larceny, or assault and battery, might, after he had given a recognizance to appear at the General Sessions, demand to be tried at the Special Sessions; for it was declared by section 24 above referred to, that if a person accused of either of these offences should be required to enter into a recognizance, to appear before the proper court to answer the charge, that he might *at any time* demand to be tried by the Special Sessions, upon which that court was required to proceed to hear and determine the accusation. Before the act of 1855, therefore, I presume it was the practice in every case, where the accused was admitted to bail and wished to be tried at the Special Sessions, to take a recognizance for his appearance at the General Sessions; and if he failed to appear at the Special Sessions, to have him indicted; and, if he neglected to appear at the General Sessions to answer the indictment, to forfeit his recognizance. The Special Sessions obtained jurisdiction, if the accused did not require to be tried at the General Sessions; or did not, within twenty-four hours after being committed on the charge, enter into a recognizance for his appearance at the next Court of General Sessions; or if, having entered into such recognizance, he saw fit thereafter to demand to be tried by the Special Sessions. The object of these provisions was, to enable the party accused of these petty offences to have a more speedy trial if he desired it. But the act of

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1855 made a very material change. (*Laws of 1855*, 613.) It greatly enlarged the powers of the Special Sessions, by declaring that it should have exclusive jurisdiction of all misdemeanors, unless it should order the complaint to be heard at the General Sessions, or unless the accused, when arrested and brought before the committing magistrates, should elect to have his case heard and determined by the General Sessions, and it was made the duty of the magistrate to inform him of this provision. If Doyle had been informed of his rights by the magistrate, or by Johnston, the clerk, and he made no election, it was the duty of the magistrate to commit him for trial at the Special Sessions, or take a recognizance for an appearance before that court. There seems to have been a doubt of the right to take a recognizance for an appearance at the Special Sessions, to remove which the act of 1859 was passed (*Laws of 1859*, 1129), which declares that if the accused elects to be tried at the Special Sessions, and is admitted to bail, a recognizance shall be taken for his appearance at that court. But there was no ground for for such a doubt, for since the time of the passage of the act of Philip and Mary (6 *Evans Stat.*, 252), in cases of petty larcenies and small felonies, the recognizance was certified to the Quarter Sessions (*Dalton's Justice*, 540; *Hugh Petersdorf on Bail*, 511), a tribunal for the trial of minor offences, analogous to our Special Sessions. The practice of taking a recognizance for the prisoner's appearance at the General Sessions was, after the act of 1835, no longer necessary or proper, for the prisoner could not, as before, elect *at any time* to be tried by the Special Sessions. He was bound, after the passage of that act, to elect to be tried before the General Sessions, when he was arrested and brought before the committing magistrate, and if he did not, at that time so elect, the Special Sessions had exclusive jurisdiction. There was some reason, before the passage of the act of 1855, for taking the recognizance in every case for an appearance at the General Sessions, but none thereafter. It matters not, therefore, whether Johnston, the clerk, informed Doyle of the provisions of the act of 1855 or not, a point that is contested in the affidavit. For when he entered into a recognizance before Justice Kelly for his appearance at the General Sessions, it must be regarded as an election by him, and as a recognition by the magistrate of his election, to be tried at the General Ses-

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sions. This being the case, the Special Sessions had no jurisdiction. He was not amenable to the process of that court, and must be discharged.

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Supreme Court, First District; Special Term, April, 1860.

RAILWAY MORTGAGES.—POWERS OF TRUSTEES.—PLEADING.— PARTIES.

The powers and duties of trustees under railway mortgages.

Requisites of a complaint in an action by a trustee respecting the trust-fund arising under a railway mortgage.

Neither the railway company which executed the mortgage, nor the depositary who holds the fund to the credit of the trustee, nor the sheriff who has served an attachment on the fund in a suit against the railway company, are necessary parties to an action brought by the trustee for the purpose of obtaining instructions as to the application of the fund to the bondholder's claims.

The fact that certain parties in interest are numerous and unknown, is a sufficient excuse for not joining them as defendants.

It is not within the office of a demurrer to state objections not apparent upon the face of the complaint,—*e. g.*, to name parties who should have been joined;—and no conclusion is to be drawn from such statements, adverse to the plaintiff.

Demurrer to complaint.

The plaintiff alleged that he was a trustee under a trust-deed from the Cleveland, Zanesville, and Cincinnati Railroad Company, conveying the track, equipments, tolls, and income of the road to secure the holders of the first mortgage-bonds of the road, amounting to \$500,000, and was authorized thereby to take possession of the road and equipments, carry it on, and apply the proceeds to the payment of the bondholders, after deducting expenses, in case the company made default in paying the coupons, &c., as they became due, for the period of sixty days after demand by the bondholders.

That none of the coupons had been paid by the company since 1856.

That the plaintiff under the trust-deed, took possession of the tolls, and income, and the same were deposited in the United States Trust Company to the credit of "George S. Coe, trustee."

The complaint set forth a letter to the Trust Company, from the president of the Railroad Company, dated February 19, 1858, informing the Trust Company that all funds thereafter remitted by the Railroad Company, "are to be deposited to the credit of George S. Coe, trustee of our first mortgage-bonds, for the purpose of paying the coupons on our bonds secured thereby." The Railroad Company had previously deposited funds in the Trust Company, since the Railroad Company had ceased paying coupons at maturity, to the credit of the plaintiff as trustee, and Beckwith had been paid some \$453 on coupons then overdue.

The complaint stated that various sums have since been deposited in the Trust Company to the credit of "George S. Coe, trustee," which the plaintiff took possession of under the said deed, and were intended to meet those coupons of the Railroad Company on these bonds, due in 1856.

That an attachment had been granted by this court in an action brought by Beckwith against the Railroad Company on coupons of the first mortgage-bonds due in 1856, 1857, 1858, and 1859, amounting to \$9520, directed to the sheriff of this city, who had served it on the Trust Company and on the plaintiff, accompanied by a special notice that Beckwith claimed that the attachment covered funds mentioned in the letter of 19th February, 1858.

That Beckwith claimed to hold the funds now on deposit in the Trust Company to the credit of the plaintiff as above stated, by virtue of that attachment.

That the holders of the coupons were numerous, and unknown to the plaintiff, and it is impracticable to make all the holders thereof parties to this action.

Four parties who are holders of a large amount of these coupons, were made defendants, and they have made demand on the plaintiff for payment out of the funds so deposited to his credit in the Trust Company.

The plaintiff alleges that he apprehends that he will be in-

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volved in some personal liability if he should pay the one or the other of these claimants, and he demands the instruction of the court, as to who is entitled to the funds standing to his credit as trustee, in the manner above mentioned.

To this complaint the defendant Beckwith demurred on grounds which appear in the opinion of the court.

Frederick A. Lane, for the plaintiff.—I. This court has jurisdiction of the person of the defendant Beckwith. 1. This court has succeeded to the power and jurisdiction of the Court of Chancery. (*Myers a. Rasbuck*, 4 *How. Pr. R.*, 83; *Sess. Laws*, 1847.) 2. The Court of Chancery had jurisdiction whenever the parties or subject, or such portion of the subject, were within the jurisdiction, that an effectual decree could be made and enforced so as to do justice between the parties. (*Hurd a. Arredondo*, *Hopk.*, 213.) 3. It is not necessary that the defendant should be a resident of this State in order to subject him to the jurisdiction of the court. All the cases show that it is only essential to acquire jurisdiction of their persons, and this can be accomplished by service of process on them. (*Mussina a. Belden*, 6 *Abbotts' Pr. R.*, 165.) 4. The interest of the plaintiff is to have the moneys mentioned in the complaint divided up equally among the coupon-holders. Beckwith claims an interest adverse to the plaintiff. The question involved is, who is entitled to the money in the United States Trust Company, and Beckwith is a necessary party, to the complete determination of that question. (*Code*, § 118; *Hallett a. Righters*, 13 *How. Pr. R.*, 43.)

II. This court has jurisdiction of the subject-matter of this action. The subject-matter is the proper disposal of certain moneys in the United States Trust Company in the city of New York, and, whether the same are held under and controlled by the provisions of the trust-deed recited in the bill of complaint. (*Mead a. Merritt*, 2 *Paige*, 402; *Messina a. Belden*, 6 *Abbotts' Pr. R.*, 165; *Newton a. Bronson*, 3 *Kern.*, 587; *Massie a. Watts*, 6 *Cranch*, 148; *McDowell a. Reed*, 3 *Louis. R.*, 391.)

III. The Cleveland, Zanesville, and Cincinnati Railroad Company ought not to have been made parties to this action. They had no interest in it. The deed of trust authorized Coe, the plaintiff, to take the income, or *any part of it*, and he did

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take it with the knowledge and assent of the bondholders, and more especially of defendant Beckwith, who accepted a *check* under the arrangement for his coupons due April and October, 1855. 1. Neither the United States Trust Company nor John Kelly, sheriff, ought to be joined as parties, as they have no interest in the subject-matter of the action or in the controversy—the judge who issued the warrant, or the attorney of record might as well be made parties. 2. It was not necessary to make Vose, Livingston, and Perkins defendants in the suit; there is nothing to show that they are coupon or bond holders. It was not necessary to make any other parties to the bill, except such as made a demand with plaintiff to have the money paid to them. (*Pierce's Am. Railway Law*, 526, 527.)

IV. The complaint states facts sufficient to constitute a cause of action. 1. The complaint shows that the plaintiff was a trustee, and trustees are always entitled to come into court to get direction as to the administration of their trust. (*Hill on Trustees*, 543, and cases cited in notes; *Dimmock a. Bixby*, 20 *Pick.*, 368, *résumé* of English cases.) Where trustees are acting under the direction and protection of a court of equity, they may file a bill for those purposes against the persons interested in the trust-property. (*Mitford's Eq. Pleading by Jeremy* (1334), Am. ed., 155–6; *Fuldan a. Fuldan*, 1 *Sunius & Stuart*, 255; 2 *Story Eq. Jur.*, 518, n. 3.) 2. The mortgage or deed of trust gives the complainant the power to take possession, on default in payment of interest, of the premises mortgaged, or any part thereof. “The tolls, rents, or income,” were a part of the premises conveyed to him, and he was by the deed bound to apply it “to the payment of the principal and interest of all of said bonds remaining unpaid.” The defendant Beckwith, by special instructions, aims at this particular fund, and seeks to have it used to pay his coupons alone. The principles of law applicable to the trusts contained in these railroad mortgages are not yet entirely settled, and are new in many important particulars. In order, therefore, to guard against any difficulty, the trustee makes his request to the court for instructions.

F. E. Mather, for the demurrant. The complaint does not state facts sufficient to constitute a cause of action.—I. If plaintiff has any standing in court, it must be as trustee under and

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by virtue of the deed mentioned in the complaint. 1. That deed does not make him a trustee, but rather under certain specified contingencies confers a power in the nature of a trust. 2. That power, as specified, is inequitable, illegal, and void.

II. If the plaintiff is thus made a trustee, he is not thereby entitled to the possession of any of the property mentioned in the deed. Before plaintiff could take possession, several contingencies must have happened, viz.: interest on the bonds must have become due and payable. Payment thereof must have been demanded from the Railroad Company. At least sixty days must have elapsed thereafter, and then, such interest being still unpaid, some bondholder who made such demand must have requested plaintiff to take possession.

III. There is no statement of facts showing in plaintiff a right to the possession of any thing.

IV. If any such right is shown, it relates solely to such possession, and for such use and purposes as the deed declares, viz.: possession of said premises (*i. e.*, said road and running stock), "and as the attorney in fact, or agent of" said Railroad Company, to "have, use, and employ the same, making from time to time all needful repairs, alterations, and additions thereto, and after deducting the expenses of such use, repairs, alterations, and additions," &c. No such possession is shown, but the possession is shown to remain in the Railroad Company.

V. It is not sufficiently stated that there are any deposits in the Trust Company to the credit of plaintiff.

VI. If it is so shown that there are such deposits, it is not sufficiently shown that they are to his credit as trustee under the deed. 1. Such deposits were made by the Railroad Company without plaintiff's interposition—and, in fact, without his knowledge thereof until after the attachment was served. 2. They were not deposits to his credit as trustee for any purpose under the deed. 3. The word "trustee," as used in this respect in the letter of February 19, 1858, merely designates the person. 4. If it does more, there is nothing to show that the company ever authorized it. 5. If the letter gives any character to those deposits, then, by reference to the deed, they are placed to the credit of plaintiff, as the attorney in fact, or agent of the depositors and Railroad Company. 6. Being so deposited, and the purpose (whether real or pretended) mentioned in the letter

not being accomplished or begun, the deposits are not beyond the reach of the attachment. 7. The deposits are a cover to hinder, delay, and defraud creditors.

VII. In case plaintiff has any color of character as trustee under the deed, no sufficient ground is shown for the interposition of this court. 1. If in respect to the deposits, plaintiff should be admitted to be credited as trustee, yet no sufficient claim upon him is shown to warrant this action. 2. If the service of the attachment should be admitted to be a claim, yet it amounts to nothing unless followed up to judgment, and further prosecution by a new action against plaintiff. 3. In such new action, if commenced, all the rights, interests, and liabilities of plaintiff could be better determined than in this, and in such action at law he would have a plain, adequate, and complete remedy.

VIII. No such actions are favored for the reason (among others) that they tend to destroy rights which creditors may gain by legal diligence.

IX. If the action can be sustained, yet not as now framed, without others being made parties. The rights of all the parties in interest cannot be determined, unless others are joined. Such are the persons, all or some of them, named in this respect in the demurrer.

LEONARD, J.—(After stating the facts.) The defendant, as one of his grounds of demurrer, insists that the complaint does not state facts sufficient to constitute a cause of action.

It is necessary then to ascertain whether the plaintiff has any title to these funds as a trustee. If he has such title, he is entitled to apply to this court for instructions as to his conduct in relation to the trust, when questions of difficulty arise, and in that event also, the defendant will have acquired no lien upon the funds in question, by virtue of his attachment.

In my opinion, the complaint fails to make title in the plaintiff to the funds in question by virtue of the trust-deed.

In order to derive title under this deed, it is necessary that the plaintiff take possession of the railroad and run it, whereby he would be entitled to the tolls and income, and, after paying expenses, could divide them among the bondholders. The complaint does not, however, allege that the plaintiff has taken

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possession of the road, or run it. The funds have been deposited to his credit in the Trust Company as trustee, but he did not acquire them in any manner by virtue of any power or authority under the trust-deed. The complaint does not show that any one was under any legal liability to deposit those funds to the credit of the plaintiff, any more than to the credit of another person. The position which he held, rendered him a very proper person to be chosen for the purpose of receiving and paying out the funds; but there is nothing to show his right to compel any person to account to him for the earnings of the road. The plaintiff could acquire that right under the deed, only by taking possession of the railroad.

True, the complaint alleges that he has taken possession of the tolls and income—but how did he do it? That has not been disclosed.

The money in question may have been taken possession of by being deposited to the plaintiff's credit, and that is all that this allegation (from the other facts stated) can mean in this case.

The allegation that the plaintiff took possession of this money by virtue of the deed, is merely a mental deduction or conclusion, without any facts stated upon which any one else can arrive at the same result.

It is stated in the complaint, that an officer of the Railroad Company visited the East, after the company were in default for the non-payment of coupons, for the purpose of making an arrangement with the bondholders; but it is not alleged that any arrangement was in fact effected, or that any change was made in the trust, or in the manner of securing the payment of the bonds or coupons, or any thing from which the plaintiff derives title to the funds in question.

The plaintiff must stand, as far as this complaint is concerned, upon the appropriation made by the letter of February 19, 1858, and the actual deposit made in pursuance thereof. The complaint does not state, expressly, that the Railroad Company deposited the funds in question, but from the whole tenor, it is fairly to be inferred. If not deposited by the Railroad Company, then none of the defendants have any interest therein.

The allegation is, that *there has been deposited* various sums

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in the Trust Company to the credit of George S. Coe, trustee; but who made the deposits, or from what source derived, is not definitely stated.

It is there alleged that the plaintiff took possession of them under the trust-deed. That he took possession is probable; but that he did so under the deed is impossible from the evidence of any fact alleged. The complaint then alleges that the funds so deposited were intended to meet the coupons which fell due in 1856. This latter averment is pregnant with meaning, and is probably the saving fact in the complaint. I am of opinion that the allegations of the purpose for which the deposits were made, of the taking possession thereof by the plaintiff; of the letter of February 19, 1858, apprising the Trust Company of the account and purpose for which the future deposits of the Railroad Company were to be made,—constitute an appropriation of the funds; and that the plaintiff was invested thereby with the title thereto, as trustee for the holders of the coupons, who had an immediate right therein, and would enforce a pro-rata division thereof on demand, and was not invested therewith as agent only for the Railroad Company. The Railroad Company cannot control or reclaim the deposit. As to them, the deposits are appropriated. The Trust Company would be liable to the plaintiff in a suit on behalf of the holders of the coupons, if they should suffer these deposits to be withdrawn on the authority of the Railroad Company alone.

The objection of the want of authority in the officers of the Railroad Company to make these deposits in the manner they did, is not tenable, inasmuch as if deposited without authority, the act would constitute a breach of trust. It does not appear that the officers had not the authority.

Courts never assume a breach of trust to have been committed. Authority to make the deposit must be presumed.

The objection for the want of proper parties is not, I think, well taken:

1. The Railroad Company have fully parted with all title to the money, and have dedicated it to the holders of the coupons.

2. The plaintiff's check will afford a good discharge to the Trust Company, and the coupons which he retires he will then hold as the trustee or agent of the Railroad Company. There-

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fore, neither the Trust nor Railroad Companies are necessary parties.

3. The sheriff has no interest at present. The fund is not in his possession or control.

4. The plaintiff's excuse for not joining all the holders of coupons, is well recognized and sufficient, viz., that they are numerous and unknown.

The demurrer is irregular, in naming others who are holders of such coupons, who have not been joined as defendants. It assumes the functions of a plea in abatement. No conclusion is to be drawn therefrom adverse to the plaintiff, as such statements are not within the office of a demurrer.

The defendant Beckwith is one of the same class of coupon-holders as the other defendants, and entitled to participate with them *pro rata* only, and it would be wholly unjust and inequitable for him to obtain the whole fund, or more than his share, by a common-law action upon his coupons. At least it so appears from the allegations of the complaint.

Judgment must be for the plaintiff on the demurrer, with leave to the defendant to answer the complaint in twenty days. The costs of the demurrer are to abide the event of the action.

HICKS *a.* BRENNAN.

Supreme Court, First District ; Special Term, April, 1860.

JUDGMENT ON DISCONTINUANCE.—NOTICE OF MOTION.—WITNESS' FEES.—TAXATION OF COSTS.

On discontinuance by plaintiff, defendant cannot enter judgment for costs ; but must proceed to have the action dismissed, if the costs on the discontinuance are not paid.

• Notice of motion to set aside a judgment for irregularity on the ground that it is improperly entered, sufficiently specifies the objection that the judgment was entered without authority.

Facts requisite to be shown to entitle the prevailing party to tax-fees for travel of witnesses.

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A witness who actually attends in two cases between the same parties, is entitled to fees in both.

Motion to set aside judgment in each of two actions between the same parties.

LEONARD, J.—It was irregular for the defendants to enter judgment on the discontinuance of the plaintiffs' attorney. If the costs were not paid by plaintiffs, the action was not in fact discontinued. (*Jennings a. Fay*, 1 *Code R.*, *N. S.*, 231.)

The defendants might then proceed to dismiss for want of prosecution, or put the case on the calendar and dismiss it when reached. The defendants' attorney was irregular in entering the judgment.

The reference to this irregularity contained in the notice of motion, I consider a sufficient compliance with the rule. The notice that the motion is made to set aside the judgment for irregularity, on the ground that it is improperly entered, seems to refer sufficiently to the matter to apprise the party that it is claimed that the judgment has been entered without authority. The judgment and execution must be set aside.

The rule in regard to the fees of witnesses attending from other States, is properly laid down in *Wheeler a. Lozee* (12 *How. Pr. R.*, 446).

The party to the action claiming the fees of the witness, must prove, by affidavit, the residence of the witness, that he travelled from thence to the place where the trial was to be had for the purpose of attending as a witness, and that the witness was material and necessary. The charge should be for the number of miles the witness travels from the State line to the place where the trial is to be had. The distance should be estimated by the nearest usually travelled route from the residence of the witness. He is not required to travel a shorter route on which there is no public conveyance, nor can he go an unreasonable distance round in order to find a public conveyance.

The defendants' affidavits must show these facts: where the witness resided; where he crossed the State line—or where the most usually travelled route from his residence to this city would cross the State line.

The disbursements actually incurred in preparing for trial

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at the January term, 1860, are allowable, but not the term fee.

I think the witness was entitled to fees in each case, if he actually attended in each case. The court cannot go into a nice distinction as to whether the issue in one case only required the attendance of the witness. The costs and disbursements must be adjusted on these principles.

No costs of the motion are allowed to either party.

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Supreme Court, First District; At Chambers, April, 1860.

JUDICIAL SALE.—PARTIES.—APPEARANCE OF INFANT LUNATIC.—
GUARDIAN APPOINTED IN FOREIGN STATE.

The rule, that where property is sold at a judicial sale without reservation or notice of defect in title, the purchaser will not be compelled to take the title if it proves defective or doubtful—applies to sales under the judgments of the Supreme Court.

The committee of an infant lunatic residing without this State, appointed under the laws of another State, cannot appear for him in an action in the courts of this State, nor, without service of summons upon the infant, proceed to have a guardian *ad litem* appointed for him.

The objection that an infant lunatic who was a necessary party to the action, was not served with summons, but was thus proceeded against, is a defect which cannot be cured except by a new action; and the purchaser under the judgment cannot be compelled to take the title.

The purchaser, on being discharged on account of defects in the title, is entitled to receive a return of his deposit, with interest from the time the sale was to be completed, and the expenses of investigating the title, and the costs of his motion to be discharged.

Petition to be discharged from a purchase of lands at a sale under a judgment in a partition action.

This action was for a partition of lands. Upon the sale of the premises under judgment in the action, one Joseph Richardson became the purchaser at the price of \$80,250, and paid the ten

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30:31 Nov. 279;
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per cent. of the purchase-money, and signed the usual purchaser's agreement at the foot of the "terms of sale," agreeing to pay the residue of the purchase-money, and take the title at a time specified in the agreement.

He now applied, on petition, to be released and discharged from his contract, and that he be restored to all that he had lost by reason of his purchase, upon the ground that the title to the premises under the judgment and the sale therein, is not such as he is entitled to demand, or bound to accept.

The nature of the objection appears in the opinion.

Marshall S. Bidwell, for the petitioner.

C. W. Sandford, opposed.

ALLEN, J.—The court has jurisdiction, and will interfere in a summary manner, at the instance of third persons, to protect them against an abuse of power sought to be exercised by an officer of the court, under pretence of an authority derived from it. (*In re. Merritt*, 5 *Paige*, 125; *Merritt v. Lyon*, 16 *Wend.*, 405.) And a petition is the proper mode for seeking relief from a contract, entered into upon the faith of a judgment of the court, when the party will not acquire under the judgment a perfect title to that for which he contracts. (*Darwin v. Hatfield*, *Selden's Notes*, 1852, 36.) Indeed, no objection is taken to the form of the proceeding, or to the proposition that a purchaser at a judicial sale cannot be compelled to accept a defective or doubtful title. It is claimed that the premises were sold at the risk of the purchaser. It was important, with a view to obtain a fair price for the property, that bidders should understand that if they paid a fair price for the property, the same being sold without reserve, they would be protected by the court, and not compelled to take an incumbered or worthless title. This is the well-established rule in mortgage and partition sales in equity, and applies to like sales under the judgments of this court. "If there is any cloud upon the title, or incumbrance upon the land, or difficulty in obtaining possession, the property should be sold at the risk of the purchaser in that respect, and in the amounts bid there would then be a reasonable allowance for such risk." (*McGown v. Wilkins*, 1 *Paige*, 120.) A pur-

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chaser who is not notified of risk in the title will not be compelled to take it, unless he can get a legal and equitable estate. (*Carter v. Clarke*, 3 *Edw. Ch. R.*, 428.)

The same principle is applied to sales by assignees in bankruptcy, who, if they give no notice of any defect in their title, or do not put bidders on their guard, by giving notice that they will sell only such title as they have, are bound to make a good title. (*McDonald v. Hanson*, 12 *Ves.*, 277; *Jervoise v. Duke of Northumberland*, 1 *J. & W.*, 549; 2 *P. Wms.*, 198; 3 *McCr.*, 53.) If there be any real doubt as to the title which the purchaser will obtain under a sale in partition,—*e. g.*, when the purchaser has reason to suppose that there is an outstanding life-estate, by reason of the alleged coverture of the complainant at the time of the commencement of the suit,—the purchaser will be discharged. (*Spring v. Sandford*, 7 *Paige*, 550.) So where an infant was made a defendant in a partition-suit, but no guardian *ad litem* was appointed, or order for appearance entered, nor the bill taken as confessed against him, a purchaser under the decree was discharged from his bid, notwithstanding the infant, having obtained his majority, offered to release his interest; the decree being so far irregular that it could not be enrolled: (*Kohler v. Kohler*, 2 *Edw. Ch. R.*, 69.) The enrollment was necessary to give a good title as to the other parties to the suit.

The reasons of the rule are obvious, and are such as require that it should be strictly adhered to. It is necessary—

1. To secure to the parties in interest a fair price for property sold under the decree of the court; and

2. To protect the purchaser, who pays a fair price for property so sold, without notice of any defect in the title.

If the purchaser was understood to buy at his own risk, it is quite evident that a greatly diminished price would be the result; and as the purchaser must take a title without covenants of warranty of any kind, he can only be protected from loss, by reason of a defective title, by being excused from accepting any but a good title.

If, then, the conveyance to the petitioner as the purchaser, under the judgment in this action, would not give him a perfect title to the premises, he should be discharged from his bid; and if there is any estate or interest in the premises which will not pass by the deed to be executed by the referee, then the title is defective.

Under the statute, partition may be had against unknown owners, the proceedings being to this extent treated as *in rem*; but when partition is sought by bill in equity, or by an action which has taken the place of a bill in equity, no one is concluded, or in any way affected by the proceedings and judgment, who is not made a party to the action, not nominally, but really, by the service of process, or some of the ways known to the law, as by a voluntary appearance in the action. In other words, the court must in some regular way have acquired jurisdiction of the person of the party to be affected by the judgment, as well as of the subject-matter of the action; and if that jurisdiction of the person has not been acquired, the judgment is, to this extent, a nullity, and the title to be acquired under it defective. (Carter v. Clarke; Darwin v. Hatfield; Spring v. Sandford, *supra*.)

Serious questions are made in respect of the appearance of, and consequent jurisdiction over, several individuals, who are nominal parties to the record and necessary parties to the action; but without passing upon all the objections taken, the objection that Samuel Mitchell, who is represented to be an "infant and idiot, of about twenty years of age," was not a party to the action, appears to be insuperable.

It is conceded that Mitchell was one of the heirs-at-law of Samuel S. Eagle, and as such entitled to an undivided twentieth part of the premises Eagle died seized of, as is claimed by their seeking to uphold the proceedings and sale. Jurisdiction may be acquired by the service of the summons, or the voluntary appearance of the defendant. (*Code*, § 139.) But an idiot has no will, and is not competent to appear in person or by attorney; and if the action be against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee has been appointed, the summons must be served by delivering a copy thereof to such committee, and to the defendant personally. (*Code*, § 134.) A service is not good which is not upon the defendant himself. (Hiller v. Hiller, 6 *How. Pr. R.*, 104.) And a guardian *ad litem* will not be appointed on the application of a relation of the lunatic, when the summons has not been served on the lunatic.

There was an attempt to serve a summons in this action upon

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Mitchell, or upon any person representing him. It does not appear, but was assumed, that he was a non-resident of the State, and a resident of the State of Ohio. No notice is taken in the complaint of his disability. There was no evidence of his idiocy or infancy, except as contained in the petition for the appointment of a guardian *ad litem*; and if the court had jurisdiction over his person, perhaps that would be sufficient. It may be conceded, as it has been decided, that an infant over fourteen years of age may voluntarily appear, and that such appearance was effectual for all purposes as a like appearance by an adult; but it must be on his own application for the appointment of a guardian. (*Code*, § 116; *Varian v. Stevens*, 2 *Duer*, 635.) Whether the court could thus assume jurisdiction over a non-resident infant under fourteen years of age, upon the application of a relation or friend, and without notice to any person, may be more questionable, but need not be decided. (*Code*, § 116, subd. 2.)

It may also be assumed for all the purposes of this motion (without deciding), that a committee of a lunatic infant, residing within this State and appointed by the courts of this State, may, without the service of a summons upon the lunatic, cause an appearance to be entered and a guardian appointed for him,—which is at least doubtful. (See *Hiller v. Hiller*, *supra*.) The difficulties of this case would not be overcome if this was so decided. In order to a voluntary appearance, there must be action by the party himself, or by some one authorized by law to speak and act for him, and the difficulty in this case is that the party did not and could not act for himself, and there was no one competent to act for him. The guardian for the “idiot infant” was appointed upon the petition of a resident of Ohio, claiming to act under an appointment of “The Court of Probate” of Warren county, Ohio, as “guardian for Samuel Mitchell, an idiotic person, aged about 20 years, of Warren county, Ohio.” What the powers and duties of a guardian thus appointed are in the State of Ohio is not known to me, but, at the most, he was but the guardian of the person and estate of the idiot within the State of Ohio. His appointment had no extra-territorial force, and gave him no power over the estates of the idiot within this State; and had the domicile of the idiot been changed from Ohio to this State, the guardianship of the

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person appointed in the State of Ohio would not have been recognized here. Courts in this State do not take notice of letters testamentary or letters of administration granted abroad or out of the State. And a person appointed guardian to an infant in another State, is not entitled to receive from the administrator here the legacy or portion of the infant. (*Monell v. Drehy*, 1 *Johns. Ch. R.*, 153.) One appointed executor in another State, and acting in this, will be regarded as an executor *de son tort*. (*Campbell v. Tousey*, 7 *Cow.*, 64.) No notice is taken of letters of administration granted abroad. (*Robinson v. Crandell*, 9 *Wend.*, 425; and see *Williams v. Storrs*, 6 *Johns. Ch. R.*, 353.) Whether the guardianship in Ohio extended to the estate, or was confined to the person of the idiot, does not appear. Whatever difference of opinion there may be among foreign jurists, as to the extra-territorial authority of guardians respecting the persons or property of their wards in America, the rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which has circumscribed the rights and authorities of executors and administrators. (*Story's Conf. of Laws*, 1st ed., § 499; *Kraft v. Vickery*, 4 *Gill. & John.*, 332.) In regard to immovable property there is no diversity of opinion, and according to the rules of the common law, as well as by the general consent of foreign jurists, the rights of foreign guardians are not admitted over immovable property situated in other countries. Judge Story says: "No one has ever supposed that a guardian, appointed in any one State of the Union, had any right to receive the profits, or to assume the possession of the real estate of his ward, in any other State, without having received a due appointment from the proper tribunals of the State where it is situate." (*Story's Conf. of Laws*, 1st ed., § 504.) There is no principle within which the Ohio guardian could, by his act and petition, made and verified in or out of this State, give the court jurisdiction of his real property situated within this State. Mitchell, the ward, was not personally within the jurisdiction of the court; he did not and could not voluntarily submit himself to its jurisdiction; he was not proceeded against by publication of a summons, which would have given the court a statutory jurisdiction; the guardian had

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no rights or authority, within this State, in respect of his person or property, and it necessarily follows that the judgment, as to him, is a nullity; his estate is not divested by the sale under the judgment.

The authorities referred to by the counsel for the parties to the action opposing the motion, relate to the procedure for the appointment of the guardian, assuming that the court has acquired jurisdiction over the person of the infant, or other party incapable by himself of defending the action. (*Story's Eq. Pr.*, § 70; 1 *Dan. Pr.*, 202; 1 *Barb. Ch. Pr.*, 86; *Mix v. Mix*, 6 *Paige*, 273; *Hiller v. Hiller*, *supra*.) They prescribe how a person under disability, *being made a party* to a suit, may defend, and in what way, and upon whose application, a guardian *ad litem* may be appointed,—not how he may become a party without process.

If the guardian *ad litem* in a partition-suit must be appointed in pursuance of the statutes regulating partition proceedings, rather than under the Code, as has been held, the result will not be different; for there is no pretence that the directions of these statutes were complied with. (2 *Rev. Stat.*, 317, § 2; *Ib.*, 329, § 80, as amended in 1830; *Laws of 1853*, 311, § 1; *Varian v. Stevens*, 2 *Duer*, 635; *Lyle v. Smith*, 13 *How. Pr. R.*, 104.)

The title, then, is not such a title as the purchaser can be required to accept, and he must be discharged from his bid. This defect cannot be cured, except by a new action. The purchaser is entitled to a return of the ten per cent. paid upon the purchase, and to be paid out of the rents and profits of the estate now in the hands of the receiver, interest upon that sum from the time the sale was to be completed and the conveyance executed. He is also entitled to be paid out of the same fund the expenses incurred in investigating the title, and the costs of this motion. (*Kohler v. Kohler*, *supra*.) These costs and expenses are fixed at one hundred and fifty dollars.

ROGERS *a.* DEGEN.

New York Superior Court; At Chambers, February, 1860.

COSTS.—ALLOWANCE.—WHAT IS A TRIAL.

Dismissing a complaint, the plaintiff not appearing to oppose, is a trial, under section 309 of the Code, and the defendant may have an allowance therefor in a difficult and extraordinary case.

Motion by the defendant for an allowance under section 309 of the Code.

The case was admitted to have been a difficult and extraordinary one. The only question was, whether there had been a trial within the meaning of the Code. On this point the facts were as follows:

The complaint sought to make the defendants, who are brokers, liable for the default of their principal. The case was noticed by the defendants for, and was called in its regular order on the calendar, and no one appearing for the plaintiff, the complaint was dismissed with costs. A deposition *de bene esse* had previously been taken on the part of the plaintiff; at the taking of which counsel had attended.

The defendants now moved for an allowance.

E. P. Wheeler, for the motion.—I. Dismissing the complaint, no one appearing to oppose, is a trial. A trial-fee is always granted under such circumstances, and it has been so held under section 307 of the Code. The word trial, defined in section 252, must have a uniform meaning. (*Voorhies' Code*, ed. 1859, 435; *Dodd a. Curry*, 4 *How. Pr. R.*, 123; *Jackson a. Figaniere*, 15 *Ib.*, 224; *Shannon a. Brower*, 2 *Abbotts' Pr. R.*, 377; *Lawrence a. Davis*, 7 *How. Pr. R.*, 354.

II. Costs are intended as indemnity for the prevailing party's expenses (*Code*, § 303), and for expenses as well before as at the

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trial. (McQuade *a.* New York and Erie Railroad, 5 *Duer*, 616.)

III. Provisions for costs are construed liberally in favor of the attorney. (Dodd *a.* Curry, 4 *How. Pr. R.*, 123 ; Jackson *a.* Figaniere, 15 *Ib.*, 224.)

H. P. Fessenden, opposed, cited the decisions that when an appeal is dismissed in the Court of Appeals, an argument-fee is not taxable.

ROBERTSON, J.—The motion in this case is for an allowance under section 309, upon the dismissal of the complaint by default, upon proof of service of notice of trial of issues of law, when the cause was reached in its order on the calendar. And the question whether an allowance can be made, must bear upon that other, whether such judgment by default is a "trial" within the meaning of that section.

It is very evident that the allowance is not given as a trial-fee alone, or counsel-fee for trying the cause (McQuade *a.* The New York and Erie Railroad Company, 5 *Duer*, 616), because it is the difficult and extraordinary character of the case, not of the trial, which determines the right to the allowance; the mere trial alone forms by itself a contingency on which the right of an allowance depends, because section 322 excludes it upon a settlement before judgment, whereas, after a trial, costs follow, to be included with judgment.

The only remaining question is solved by the Code; and here I do not think the definition in section 252 is strictly applicable, as there can hardly be said to be a "judicial examination," when the default of a party is taken; but in regard to costs and indemnity of expenses, I think the term has a wider meaning, and this being a modified continuation of a prior fee-bill, in which "trial" included every mode of disposing of issues in a case.

In this sense it is used in section 307 of the Code, where, under subdivision 4, it has been held that the word trial, as applied to issues of fact, included judgments by default (Dodd *a.* Curry, 2 *Code R.*, 69 ; S. C., 4 *How. Pr. R.*, 13), and it certainly must include similar judgments on issues of law mentioned in the same subdivision, and such was the view undoubtedly taken in *Lawrence a. Davis* (7 *How. Pr. R.*, 354).

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The fact that no evidence is taken, or other proceedings on a trial, is immaterial. (Shannon *a.* Brown, 2 *Abbotts' Pr. R.*, 377.) The only effect of want of litigation on the trial would be to reduce the amount of counsel-fee or extra allowance, not to take away the right to it altogether.

I think this a proper case for an allowance of five per cent. on the amount claimed.

MONCRIEF *a.* MONCRIEF.

Supreme Court, First District; Special Term, April, 1860.

ORDER FOR ALIMONY.—APPEAL.

An order making an allowance to the wife, pending an action for divorce, is not appealable.

Order to show cause why a stay of proceedings should not be vacated.

BONNEY, J.—This is an action by a wife against her husband for separation. Answer was put in, and the action noticed for trial at February circuit. On plaintiff's motion, on notice, an order was made on 9th March last, that defendant pay to plaintiff, on 12th March, alimony at the rate of five dollars per week, from the commencement of the action, and a counsel-fee of fifty dollars to her attorney. From this order the defendant, on 10th March, appealed to the general term; and he thereupon gave the undertaking for the payment of any amount which may be awarded against him in the appeal; and on the 2d April, inst., on an affidavit of these facts, he obtained from me an *ex-parte* order staying plaintiff's proceedings on said order of 9th March, until the hearing and decision of the appeal.

The plaintiff, in order to show cause, now moves to vacate said order staying proceedings, and in my opinion the motion must be granted. Section 349 of the Code does not, I think, include the order in question, in its specification of the orders from

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Matter of Whitlock.

which an appeal may be taken. Clearly this order is not a *provisional remedy*. (See *Code*, tit. 7.) Nor can it be said that it affects a *substantial right* of the defendant within the meaning and intent of subdivision 3 of said section 349, inasmuch as the granting or refusing alimony or an allowance for legal expenses during the pending of a suit is entirely within the discretion of the court. (3 *Rev. Stat.*, 5th ed., 230, § 72.)

The purpose for which these and all similar allowances are made in all cases, whether the wife be plaintiff or defendant, is to provide for her present maintenance during the pendency of the action to which she is a party, and to enable her to pay expenses of bringing her cause to trial; and if the husband can, by appeal, stay proceedings on such orders for allowance, he may thereby render the statute which authorizes them in effect nugatory; and the wife, whether plaintiff or defendant, may not only be defeated in the action for want of ability to pay the necessary expenses of trial, but may, while the suit is pending, be reduced to absolute destitution, and starved into submission to her husband's demands.

Order staying proceedings vacated, with ten dollars costs to plaintiff.

MATTER OF WHITLOCK.

Supreme Court, First District; At Chambers, April, 1860.

SALE OF INFANT'S REAL PROPERTY.—NEXT FRIEND.—
INCUMBRANCE.

Under the provisions of 2 Revised Statutes, 194, § 170—authorizing infants to apply, by next friend or guardian, to the court for the sale, &c., of their real property—an appointment of a next friend to present the petition is not necessary. The court may proceed upon a petition presented by the natural guardian,—*e. g.*, the mother of the infants.

A reservation or covenant that five feet of the front of a lot shall not be built upon or used except for steps, &c., is an incumbrance, and entitles the purchaser at a judicial sale, free of incumbrance, to be discharged.

Petition for order compelling purchaser to take title.

Matter of Whitlock.

BONNEY, J.—Under petition in this matter, James B. Wilson has been appointed special guardian of Mary Jane Whitlock and others, infants, and under order of the court, has made a contract for the sale of their real estate in the city of New York; which contract has been reported to, and approved by the court, and said guardian has been, by another order, authorized and directed to carry such contract into effect, and to convey the property on receiving payment therefor.

The purchaser of said real estate refuses to pay the consideration and receive the deed therefor, executed by said special guardian, upon two grounds:

I. He insists, under advice of counsel, that the appointment of said special guardian, and all the subsequent proceedings in this matter, are void, for the reason that Elizabeth M. Whitlock, by whom, on behalf of said infants, and as their next friend, the original petition was presented, was not authorized to represent said infants, or to make the application on their behalf.

This is a strictly statutory proceeding, and, unless the requirements of the statute have been complied with, no title will pass by the deed. (Rogers *a. Dill*, 6 *Hill*, 415.)

The statute provides that any infant seized of real estate, may, *by his next friend or by his guardian*, apply for the sale or disposition of the same; and that, *on such application*, the court shall appoint a guardian, &c. (2 *Rev. Stat.*, 5th ed., 275, §§ 100, 101.)

Mrs. Elizabeth M. Whitlock, by whom, acting as next friend of said infants, the application to the court in this matter was made, was not by any court or legal proceeding, appointed such next friend, but, being the mother, nearest relative, and next of kin of such infants, and as such their *natural guardian*, she assumed the title of their "next friend," and in that character presented the original petition.

Was she such "*next friend*" within the meaning and intentment of the statute above referred to?

In this State provision has been made by statute for the *appointment* of a next friend or guardian *to prosecute or defend any action* that may be brought by or against an infant, who can appear and prosecute or defend only in the manner so provided. (1 *Rev. Stat.*, 416, § 2; 2 *Ib.*, 445, &c., §§ 1-12, and 232, §§ 40-43; *Code*, §§ 115, 116.)

In other cases of legal disability, also, provision has been made for the prosecution and defence of actions by or against persons incapable of acting in their own behalf. (2 *Rev. Stat.*, 142, §§ 20-34.)

Before these enactments, there appears to have been no settled practice or certainty in relation to the appointment, duties, or responsibilities of the next friend of an infant plaintiff. (*Dan.'s Ch. Pr.*, 90, &c.; *Story's Eq. Pl.*, § 57, &c.; 1 *Hoffm.'s Ch. Pr.*, 54, &c., and cases referred to.)

The statute under which the proceeding now in question was had, is wholly distinct from the statutes above maintained, which provide for the appointment of a next friend or guardian of an infant *party to an action*. The words of the statutes are not the same, and the purposes for which a next friend appears and acts under said statutes, respectively, is wholly different. The next friend of an infant plaintiff directs, and is responsible for the prosecution of the action, and is also liable for costs of the defendants, and to account to the infant whom he represents, for the proper prosecution of his claims, and for any money or property which he may recover or obtain thereby. It is, therefore, eminently proper that such next friend be approved of and appointed by the court, and required (if necessary) to give security for the performance of his duty.

In the proceeding now in question (which is not an action), the guardian or next friend authorized by the statute to make the application has no duty to perform or power to act, except merely to bring the matter before the court, which then takes cognizance of the proceeding, and appoints a responsible guardian, authorized to act on behalf of the infant, and takes security as provided by statute for the faithful performance, by such guardian, of his duty. If the "next friend," before he can present the petition, must be appointed by the court, who shall make the application for his appointment? The statute makes no provision for such an application, and the rule of court clearly intimates that his presentation of the petition is to be the *first* step in the proceeding. (*Rule 66.*)

In my opinion, Mrs. Whitlock, the mother of the infants whose property is contracted to be sold, was their "next friend," within the meaning of the statute, and authorized, without previous appointment by the court, to make the first application in

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this matter, and consequently the objection made by this purchaser to the authority of the special guardian to sell and give title to the premises is not well taken.

II. By the contract for the sale of the premises they are to be conveyed *free of incumbrances*. The title of the infants is derived through a deed which conveys the lots subject to a reservation or covenant that five feet of the front thereof shall not be built upon or used except for steps, &c. This is undoubtedly an incumbrance on the lots, restricting the owner in the use thereof, and if not excepted in the contract, nor known to the purchaser when he made it, justifies him in refusing to perform it. (Maxwell v. East River Bank, 3 Bosw., 124.)

For this reason the prayer of the petition must be denied. The respondent is entitled to have the contract of sale cancelled, and to be repaid the money which he has advanced on account of the purchase.

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New York Common Pleas ; General Term, May, 1860.

ARREST.—JUDGMENT OF MARINE COURT DOCKETED IN COUNTY CLERK'S OFFICE.—EXECUTION AGAINST THE PERSON.

One who, in collecting a claim of his own, unites with it a claim belonging to another creditor, under an agreement with the latter to account to him for a due proportion of the amount collected,—receives such proportion in “a fiduciary capacity,” and is liable to arrest in an action for not paying it over.

After a judgment, recovered in the Marine Court, has been docketed in the county clerk's office, the creditor may have execution against the person of the debtor, as if the judgment had been recovered in the Court of Common Pleas.

Appeal from an order denying leave to issue execution against the person.

The decision of the court on the original motion is reported *Ante*, 103. The facts of the case are fully stated there, and in the following opinion :

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James S. Stearns, for the appellant, cited *Noble a. Prescott* (4 *E. D. Smith*, 139); *Stoll a. King* (8 *How. Pr. R.*, 298); *Schudder a. Shiells* (17 *Ib.*, 420); *Frost a. McCarger* (14 *Ib.*, 131); *Ridder a. Whitlock* (12 *Ib.*, 208).

James M. Sheehan, for the respondent.

BY THE COURT.—HILTON, J.—The additional affidavits read on the rehearing of the motion, at special term, in my opinion, conclusively establish the following facts :

Through the agency of the defendant, the plaintiff was employed to, and did furnish work, and labor, and materials for the ship *Telegraph*, amounting in all to \$437.61. The defendant also furnished work and materials amounting to about \$7500. Neither being paid, and the defendant being about to libel the vessel, called upon the plaintiff and requested permission to put his bill in the same libel, to which the plaintiff assented, and thereupon he transferred his claim to the defendant, upon the express agreement that each should receive a *pro rata* share of the amount collected in the admiralty proceeding. Under both claims, the vessel was subsequently sold, the defendant receiving the entire proceeds, \$4757.53 (exclusive of costs), which was about 60 per cent. upon the amount of the decree, and which included the demand of the plaintiff. The defendant not paying over, as he agreed, the share of the amount so recovered and belonging to the plaintiff, the plaintiff sued him for his entire claim of \$437.61, in the Marine Court. On that action being brought to trial, the defendant stipulated that judgment be entered against him for the amount *actually received* by him, and *belonging to the plaintiff*, being \$250 ; and on this stipulation being accepted, judgment was entered. The judgment, therefore, was clearly for moneys received by the defendant in a fiduciary capacity, and had the action been brought in a court of record, the defendant might have been arrested, and upon the rendition of judgment, the plaintiff would have been entitled to an execution against his person. (*Code*, § 179, subd. 2, § 288.)

In *Ginochio a. Figari* (4 *E. D. Smith*, 227), it was held that after a transcript of a judgment of the Marine Court has been filed in the county clerk's office, by the provisions of the Code (§ 68), it is to be deemed a judgment of this court, has the

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same effect as a lien, and *is to be enforced in the same manner.* (Waltermire *a.* Westover, 4 *Kern.*, 16.) And as a judgment of this nature, when obtained in this court, would be enforced by execution against the person of the defendant, it follows that a plaintiff is entitled to the same remedy in all respects, upon filing a transcript of a Marine-Court judgment, where the nature of the action falls within the provisions of section 179.

As it appears in the present case, that an execution against the property of the defendant has already been issued, and returned unsatisfied, the plaintiff is, in my opinion, entitled to issue an execution against the defendant's person, under the provisions of section 288.

The order at special term, therefore, was erroneous, and should be reversed, and an order instead entered, granting leave to the plaintiff to issue the execution asked for, with \$10 costs of the motion; and for this appeal, \$10 in addition.

DALY, F. J., and BRADY, J., concurred.

Order appealed from modified, by granting leave to issue execution asked for, with \$10 costs of motion, and \$10 costs of this appeal.

HARTT *a.* HARVEY.

Supreme Court, First District; Special Term, May, 1860.

RELIGIOUS CORPORATION.—ELECTION.

On an election of trustees in a religious corporation, the judges of election can pass upon the qualifications of a voter only before his vote is received. They have no power to disregard votes which they have once received.

The certificate of the judges set forth that one set of candidates had a majority of the votes cast, but that after the result had been declared, satisfactory evidence was produced to the judges that a part of the votes for such candidates were illegal, and that, setting these aside, the other set of candidates were

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elected, which the certificate, therefore, declared to be the result of the election.

Held, that the certificate destroyed itself, and that the former set of candidates were to be deemed elected.

An injunction cannot be granted in an action between individuals to try the right to office in a religious corporation. The remedy is by an action in the nature of a *quo warranto*.

On an application to continue a temporary injunction under section 129 of the Code of Procedure, the court will inquire into the question whether the court has power to grant the relief demanded.

Motion to continue an injunction, and motion to modify an injunction.

The nature of the action and the facts are stated in the opinion.

Edward Gilbert and *William Curtis Noyes*, for the plaintiffs.

Elial F. Hall, *E. W. Chester*, and *William M. Evarts*, for the defendants.

MULLIN, J.—In order to decide the motions made in this cause, an investigation of the merits, to some extent, is necessary, and the facts essential to an understanding of the case are briefly these: In March last, the annual meeting for the election of trustees was held by the religious society located in this city, duly incorporated and known as the Society of the Church of the Puritans. The defendants, White and Smith, were duly appointed inspectors of the election, pursuant to the provisions of the general law relating to the incorporation of religious societies. At the election, sixty-four votes were received by the inspectors for persons to fill the vacancies in the office of trustees of said society, which would occur in a few days subsequent to said election. There were nine trustees of the society—divided into three classes, of three each, the term of office of one of such classes expiring each year. There were, therefore, three vacancies to be filled at said election. The plaintiffs were candidates to be voted for to fill said vacancies; and so were the defendants Harvey and Tompkins, and one Bennett. The ballots of the persons voting were delivered to the inspectors; some of them offering to vote were challenged, on the ground that they were not legal voters at said election, and they

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were so declared by the said inspectors, and their votes rejected. After the votes were all received they were counted by the inspectors, and sixty-four votes were found in the box. The poll-list kept by the clerk had but sixty-one names upon it. There is said to have been some confusion in the room, and the discrepancy between the poll-list and the count may be, and probably is, thus accounted for.

After the count, the inspectors declared the result of the election to be : That the plaintiffs had each thirty-three of the votes, so as aforesaid received and counted ; and the defendants, Harvey and Tompkins, had each thirty-one ; and said Bennett had twenty-seven votes, and one Thomas Rondy three votes.

Afterwards, and on the 23d of March, the said inspectors executed, under their hands and seals, a certificate, in which they certify and declare that at said election sixty-four votes were cast for trustees, thirty-three of which appeared to be given for Hall, thirty-three for Whiting, and the same number for Hartt ; thirty-one for Harvey, and the like number for Tompkins ; twenty-seven for Bennett, and three for Rondy ; and that they as inspectors declared the apparent result at the time : but very soon thereafter, and before they had prepared the certificate of election, evidence of a nature entirely conclusive and satisfactory was produced before them, proving that at least six illegal votes were cast, and those six contained the names of the plaintiffs, and that these were counted as part of the thirty-three votes for them as above stated. The certificate then proceeds as follows : " We, therefore, certify that Charles R. Harvey and Charles B. Tompkins have a plurality and a majority of the legal votes cast, and are duly elected trustees of the said society, to serve for three years from the 31st day of March, inst. ; that between the said Thomas J. Hall, William E. Whiting, Henry A. Hartt, and James D. Bennett, there was a tie vote, and neither of them is duly elected. All which is certified," &c. This certificate was delivered to the defendants Harvey and Tompkins, who still hold it, and by virtue of it they claim to be duly elected trustees of said society for the term of three years.

Before the first meeting of the board of trustees was held subsequent to such election, the plaintiffs, claiming to be duly elected trustees of said society, applied for and obtained a

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temporary injunction-order, restraining the defendants Harvey and Tompkins from acting or assuming to act as trustees of said society.

The defendants presented to Justice Bonney a petition setting out the matter hereinbefore stated, charging upon plaintiffs and others of the trustees misconduct at a meeting of the trustees, held soon after said election, and that it was their intention to prevent the attendance of a quorum at the meetings of the trustees, and thus seriously impair the interests of the society, and praying that the plaintiffs be enjoined from acting or assuming to act as trustees. The injunction as prayed for was granted and served.

The applications now pending before me are to continue these injunctions, and by the defendants to modify plaintiffs' injunction, so as to allow one of the defendants to act as trustee, in the event it shall be necessary to do so in order to form a quorum for the transaction of business.

Before proceeding to examine the question whether the court has power to issue an injunction-order in favor of either party in this court, it is proper to inquire which set of claimants is duly elected trustees.

By section 3 of the general law relating to the incorporation of religious societies, it is provided that, on the day of the first election of trustees of any such society, two elders, or churchwardens, or if there are no such persons, then two others, selected for the purpose, shall preside at such election, receive the votes of the electors, be the judges of the qualifications of electors, and the officers to return the names of the persons who by a plurality of votes shall be elected to serve as trustees, and the returning officers shall immediately thereafter certify under their hands and seals the names of the persons elected, &c.

By section 6 it is provided that all subsequent elections shall be held and conducted by the same persons, and in the manner above described, and the result thereof certified by them, and such certificate shall entitle the persons elected to act as trustees.

Section 7 of the same statute prescribes the qualifications of the voters, and requires the clerk to the trustees to keep a register of the names of such as shall desire to become stated hearers in said church, and shall therein note the time when such request

was made, and the clerk shall attend all subsequent elections, in order to test the qualifications of such electors, in case the same shall be questioned.

There was no such list kept as is required by section 7, and hence the test of qualification which such a document would furnish is wanting. But it is not claimed that such a list is necessary to the validity of the election, or that the qualifications of voters may not be ascertained by other means. (The People *v.* Peck, 11 *Wend.*, 604.)

The inspectors are declared to be judges of the qualifications of voters. Their action on that subject is judicial, and can only be reviewed in an action or proceeding instituted to review such determination.

To constitute a person a voter, he must have been a stated attendant on divine worship in the said church at least one year before such election, and shall have contributed to the support of said church, according to the customs and usages thereof. If a voter is challenged on the ground of the absence of some one or more of these qualifications, the inspectors must inquire, ascertain, and determine whether the voter possesses them.

The question arises for decision when the voter offers his vote, then the challenge is made, and the voter's right to vote must be determined before it can be received or rejected. If the vote is not challenged, there is no question for decision; the vote must be received. (Matter of the Chenango County Mutual Insurance Company, 19 *Wend.*, 635.) If he is challenged, the judge must in some mode ascertain and determine the question of qualification. For what purpose? In order that the person challenged may vote if qualified. When the vote is received, the party has voted—his qualifications are ascertained, and the judge has decided the question. The voter has an interest in the determination; he has a right to be heard, and in many, if not most cases, he is the only person who can speak with certainty as to his qualifications. It cannot be possible that the Legislature intended that three inspectors should receive votes without challenge, or in defiance of a challenge, and after the election is ended enter into an examination of the qualifications of the voters, and count or reject votes as they shall then determine on the question of qualification. How are they in that stage of the

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business to ascertain which of the ballots to withdraw from the box and reject? Inspectors cannot be presumed to know the contents of the ballot. How, then, are they to separate the legal from the illegal—the votes of those qualified from the votes of those disqualified? The very statement of the proposition that such a power exists, excites surprise and alarm. It needs no argument to show how dangerous and how corrupt such a power, in the hands of any class of men, however respectable, would become.

The innocent and legal voter, under such a system, is as likely to have his vote rejected as the illegal and fraudulent one. But it cannot be necessary to discuss the proposition. The inspectors, as judges of the qualifications of voters, must decide when the vote is offered, and the decision then made—if in favor of receiving the vote—is final. From the very necessity of the case, a decision cannot be delayed until after the vote is deposited in the box.

The act of the inspectors in rejecting six of the plaintiffs' votes as illegal, after the same had been received and deposited in the box, was wholly unauthorized, and, so far as that question is involved in these motions, I must assume that the plaintiffs had thirty-three of the sixty-four votes cast, and having a plurality were, therefore, elected, unless there is some other reason shown why they were not thus elected.

It is said that the certificate of the inspectors given to the defendants Harvey and Tompkins, is at least *prima-facie* evidence of their right to the office, and conclusive, except so far as the courts may, in an action on the motion of *quo warranto*, try and determine the right to the office without reference to the certificate.

I have no doubt that a certificate under the hands and seals of the inspectors, that a person has been duly elected a trustee, is *prima-facie* evidence of his right; and had the certificate given to the defendants contained nothing but the declaration that defendants are elected, I should deem myself bound to so regard it. But it recites the facts upon which they rely as their justification and authority for declaring these parties elected, and these facts most clearly show that the defendants Harvey and Tompkins were not elected. When the inspectors admit that sixty-four votes only were received by them and placed in the

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box, and that of them plaintiffs had each thirty-three, it is shown to be legally impossible that the defendants Harvey and Tompkins could be legally elected. The certificate destroys itself. While it declares the right, it demonstrates that no such right existed. The statute only provides that the certificate shall entitle the party *elected* to the office. The election lies at the foundation of the right. When there is no election, there is no right, and the certificate cannot create it. Much stress was laid, on the argument, upon this certificate; but so long as it is *prima-facie* evidence only of the right, and the right exists to go behind it and inquire into the fact of the election, its importance is not very great. A certificate is not essential to enable the party elected to take his office. If inspectors neglect or refuse to give a certificate, the party entitled will be declared entitled to the office. (The People *v.* Peck, 11 *Wend.*, 604.)

I must hold, therefore, that, upon the certificate in this case, no right is shown in the defendants to the office, and, of course, I cannot confer on them the right to a seat in the board of trustees, to which they have no color of right by election.

I have not gone into the question of the qualifications of voters in order to ascertain how the vote would stand, if the votes of legal voters, if any, which have been rejected, had been received, or if illegal votes, if any, received, had been rejected. I have treated the decision of the inspectors as to the qualification of voters as conclusive, for the purposes of this investigation. It would be exceedingly hazardous to try such a question on affidavits, and it would be improper now to allow to either party the benefit of votes offered, but not received, merely because the person offering the vote proves that he intended to vote for plaintiffs or defendants. (In matter of Long Island Railroad Company, 19 *Wend.*, 37.) The result of the election must be determined by the votes cast. If illegal votes can be ascertained, they may be rejected. But votes not received can never be made available in favor of either party.

If these views are correct, then I must consider the plaintiffs as the legally-elected trustees of the church; and it only remains to inquire whether, if they are so, the court has power to restrain the defendants, who have no right to the office, from assuming to act as such—or whether, upon any other

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ground, the plaintiffs are entitled to an injunction against the defendants.

I have already stated the substance of the complaint. The only additional allegations which it seems to me important to refer to are, that the inspectors, and each of them, are charged as follows: that they wrongfully and corruptly, designing and intending to evade the law, and also conspiring together to injure and annoy the plaintiffs, and defraud them of their rights and privileges as trustees duly elected by the said society, did illegally and fraudulently, and to the great trouble and damage of the plaintiffs, give and grant to defendants, Harvey and Tompkins, certificates of their election, whereby the said H. and T. give out and threaten to act as trustees. The plaintiffs pray judgment that the certificates given to H. and T. be adjudged null and void—that said defendants be ordered to grant regular certificates of election to the plaintiffs, and for a temporary injunction restraining the defendants H. and T. from acting as trustees, and for \$5000 damages sustained by the plaintiffs in the defendants granting and receiving said certificate, and in their, the defendants H. and T., acting or assuming to act as trustees.

Section 129 of the Code of Procedure prescribes the cases in which temporary injunctions may be issued, and they are :

1. When it appears by the complaint, the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission, or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff.

2. When, pending the litigation, the defendant threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

3. When, during the pendency of an action, defendant is about to dispose of his property with intent to defraud his creditors.

This case is most clearly not within the third branch of the foregoing section, nor is it within the second branch. If the defendants, Harvey and Tompkins, should take possession of the office, the judgment in this case would not be rendered ineffectual. When the judgment shall declare that plaintiffs are entitled to the office, the defendants, if then in office, will be ousted, and

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the plaintiffs put in. The possession of the office by the defendants, in the intermediate time, cannot in any manner affect the ultimate rights of the plaintiffs under the judgment, if they shall obtain any. It is true, that in the mean time, while defendants are kept in, the duties may be being discharged by the defendants, but if there was a quorum without the plaintiffs and defendants, the same result must follow; hence, when the right of the plaintiff is declared, it can have no retroactive effect upon the right or claim to the office.

The term of office is running, whether defendants are in or out of office, and the business of the corporation must, if possible, be carried on, although the right of a portion of the board be doubted, or in dispute.

The right to the injunction, then, rests on the first branch of the section, and if not given by that, it is not within the power of the court to grant it.

Under the first clause, the test of the right to the injunction-order is, does it appear by the complaint that the plaintiff is entitled to the relief demanded? The question then is, are the plaintiffs entitled to all or any part of the relief prayed for in the complaint? It cannot be claimed that an injunction, permanent or temporary, is required in aid of that part of the relief which seeks compensation in damages, by reason of the wrongful withholding of the certificate, and keeping the plaintiffs out of office. It belongs to a court of law to grant that branch of the relief, and nothing is alleged in the complaint to show that an injunction is either necessary or proper in aid of the plaintiffs, while prosecuting the suit to obtain that part of the relief demanded.

Another part of the relief sought is, that the certificate of the defendants be declared null and void. This calls for an inquiry by the court into the right of the defendants to the office, and necessarily into the regularity of the election. This question ordinarily can only be tried in a proceeding in the nature of a *quo warranto*, which is expressly provided to try the right of a person to an office, into which he may have unlawfully intruded. In that action the people may be the party, and the only party plaintiff. The claimant of the office, who seeks to be admitted, may be joined as relator, and the occupant of the office, the defendant, and in such action the right of both the relator and

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the defendant is determined. This is not an action in the nature of a *quo warranto*, and hence the jurisdiction of the court to grant the relief sought must be found, if at all, under some other head of jurisdiction, but is, as to that part of the relief prayed for now under consideration, a suit in equity to try and determine the right of the plaintiffs and defendants to the office of trustees of this private corporation.

The chancellor held, in *Meekly v. Rochester City Bank* (11 *Paige*, 118), that a court of equity cannot interfere to restrain persons claiming to be the rightful trustees of a corporation from acting as such, on the ground that they have not been duly elected. Neither will a court of equity entertain a bill by shareholders in an incorporated joint-stock company, seeking merely to restrain the directors *de facto* from acting as such, on the sole ground of the alleged invalidity of their title to their office. Whether the parties claiming to be directors do or do not lawfully fill that character, depends on a pure question of law—a preliminary question which must be decided before a court of equity can make any decree. (*Mozeley v. Alston*, 1 *Phil. Ch. R.*, 790; *Doremus v. Dutch Church*, 2 *Green, N. J. Ch. R.*, 332; *Angell & Ames on Corporations*; see 9 *Barb.*, 66, 91, 93; affirmed, 1 *Kern.*, 243; 17 *Ves.*, 499; 13 *Ib.*, 509.)

It seems to me that upon these authorities it is impossible to hold that there is any jurisdiction in a court of equity to determine the right to an office, unless the jurisdiction attaches by reason of some considerations in the particular case by reason of which the court of law cannot furnish adequate relief.

The Supreme Court has the power, by 2 Revised Statutes, 5th ed., 600, section 5, to inquire into the regularity of corporate elections, and to vacate them, and direct new elections to be held. But religious corporations are expressly excepted from the operation of this statute, and hence, as to the disputed right to an office, must be settled in some other manner.

The only way, therefore, to get rid of officers illegally elected (unless there is jurisdiction in equity) in religious corporations, is by *quo warranto*. But to entitle the people to bring such an action, a mere claim to be an officer is not enough—the defendant must be in possession of the office. (*Angell & Ames on Corporations*, § 714.) The defendants, it appears, are not in possession of the office, having been prevented by injunction from

taking possession before there was an opportunity for the performance of an official act. Under these circumstances, it seems to me, the plaintiffs cannot ask relief on the ground that the defendants are not in office, when their own act has prevented defendants from taking it.

The remedy by suit in the nature of *quo warranto*, is the plain and obvious remedy for the plaintiffs. That action is adapted to the case. If required it may be tried by a jury in a court of law, where legal questions are properly cognizable. The reason given by the courts of equity for not taking jurisdiction of questions of corporate elections, is, that the right to the office involves a legal question, and that should be tried and determined at law before resort is had to equity.

Although the distinction between actions at law and in equity is abolished, yet the inherent distinction between legal and equitable jurisdiction and relief exists, and it is not in the power of constitutions or legal enactments to abolish it. This natural and necessary distinction is recognized by the constitution, and is provided for by the Code, in prescribing different modes of trial for the two classes of actions.

There is but one other ground on which relief in equity in this case can be claimed, and that is, the fraud charged on the inspectors in counting the votes and awarding the certificate. Fraud is one of the most extensive branches of equitable jurisdiction, and, indeed, it may be said that it is the prominent and peculiar head of jurisdiction in courts of equity. But courts of law have had concurrent jurisdiction with those courts in matters of fraud; but owing to the power of courts of equity to shape the relief granted to the necessity of the case in hand, those courts always have been and always will be the appropriate tribunals for the trial of those questions.

But, as I have already remarked, a court of equity refuses to entertain jurisdiction over corporate elections, because the questions involved are legal ones, and were properly triable in a court of law. It would seem to follow that, although fraud may be involved in the election, yet that the right being a legal one, and a legal remedy furnished, adapted to the very case, there is no necessity of a resort to courts of equity for relief. Again, if fraud in the inspectors of election will give jurisdiction to the equity court, fraud in the voter should have the same result, and thus

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almost every contested election would be drawn away from the usual and proper modes of trial for legal actions, and transferred to the courts of equity, no more capable of affording relief than the courts of law.

There is still another reason why neither courts of law nor equity should try the right to an office in an action between individuals. Such a trial does not determine the right, it does not end the litigation. In an action in the nature of *quo warranto*, the people are the parties plaintiff, or with the person claiming the office as relator, against the defendant, the person in office. In such an action, not only is the right of the defendant determined, but that of the relator also; hence, if the defendant is found not entitled, but the relator is, the former is put out and the latter put in; but if neither is entitled, both are ousted, and the office is declared vacant. Every claimant is bound, his rights determined, and a final end put to the litigation. In an action between the claimants for the office, when the people are not a party, the rights of the latter are not affected, the judgment does not bind them, and they are, therefore, at liberty to litigate the whole question again, to the great annoyance and expense of parties, and making unnecessary labor for the court.

I will not say that in no case may a court of equity entertain jurisdiction between individuals to try the right to an office. Circumstances may be supposed when, by the act of the claimants of the office holding the evidence of the right to it, but not in fact entitled, the proceeding by *quo warranto* or *mandamus* could not be instituted, and yet the other party claiming title to the office cannot get into possession. In such case, to prevent a failure of justice, a court of equity would assume jurisdiction and determine the right.

No such necessity is shown or alleged in this case, and hence I must hold that this court, as a court of equity, has not power to grant the plaintiff the relief demanded, and, therefore, I cannot continue the injunction. I have already said that if the plaintiff is held entitled to damages, the continuance of the injunction is not essential to the protection of his right in reference to that relief.

I am aware it is not usual, nor ordinarily is it proper, to inquire into the right of the court to grant relief upon an appli-

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cation for an injunction; still less to refuse an injunction when the question of jurisdiction is doubtful, and when refusing it may produce injury to the party applying. But the Code requires, as prerequisite to the injunction, that it appears by the complaint that the party is entitled to the relief demanded. This involves the question of the power of the court to grant relief in the case; and as I have no doubt but that the court, as a court of equity, has not power to grant the relief demanded in this case, I must deny the plaintiff's motion for a continuance of the injunction.

The motion of the defendants is also denied, without costs to either party.

CAMERON *a.* FREEMAN.

Supreme Court, Third District; Special Term, March, 1859.

REFERENCE.—LONG ACCOUNT.

Though the issues in the action are such that it may prove that the examination of a long account will be important collaterally, this does not render the action referable without the consent of the parties. The issues must be such as to involve directly such examination.

Motion for reference.

The action was for an accounting. The complaint set forth a partnership adventure between two firms, and alleged that plaintiff had, by assignment, succeeded to the interest of a member of one of the firms, and alleged that a settlement of accounts which had been made, was obtained by defendant's false representations, and without plaintiff's knowledge. The answers denied the interest of the plaintiff in the adventure, and also the grounds on which he sought to open the settlement of account.

W. A. Beach, for the plaintiff.

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A. B. Olin, J. H. Reynolds, and D. L. Seymour, for the defendants.

HARRIS, J.—It is declared by the first subdivision of section 271 of the Code, that the court may, without the consent of the parties, direct a reference “where the trial of an issue of fact shall require the examination of a long account on either side.” Substantially the same provisions had long before existed. (2 *Rev. Stat.*, 384, §§ 39, 41.) Under these provisions, it was well settled that a reference could not be ordered against the will of any of the parties, unless the accounts to be examined were directly in issue. An action for a *tort* was never referable, although it frequently happened that the trial of such an action involved *incidentally* the examination of a long account. “The Legislature intended,” says BRONSON, J., in *Dedrich’s Administrators v. Richley* (19 *Wend.*, 108), “to provide for those cases only where an account was *directly* involved in the issue, and where little was to be done beyond a proper adjustment of the dealings of the parties.” (See also *Silmser v. Redfield*, 19 *Wend.*, 21; *Dewey v. Field*, 13 *How. Pr. R.*; 437; *McCullough v. Brodie*, 13 *Id.*, 346.) In the latter case, BOSWORTH, J., says, that though “it may be true that the class of actions in which the court can order the whole action to be tried by the referee, without the consent of either party, is enlarged by the Code, the fact which warrants the exercise of the power is the same now as when the Revised Statutes alone gave the authority to refer.”

If this be so, if the fact, which warrants the court in directing that the issues in the action shall be tried by referees, is the same now as it was when the court derived its authority to refer from the Revised Statutes, it follows, in the light of the established practice as it existed before the adoption of the Code, that the court is only authorized to direct a reference when the issues in the action involve *directly* the examination of a long account. It is not enough that such an examination may, in the progress of the trial, become important *collaterally* for the purpose of establishing some other issue.

In this case, it is denied that Coffin, to whose rights the plaintiff has succeeded, was ever interested in the transactions in respect to which an account is sought. This issue must be estab-

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lished in favor of the plaintiff, before an accounting can be necessary, or even proper. Again, it is insisted that, whether Coffin was interested or not, the transactions have been settled and closed with the defendant Grant, one of the partners. This issue, too, will have to be determined against the defendants, before the plaintiff will be entitled to have an account stated, for the purpose of ascertaining any amount which may be due to the plaintiff. It is insisted, however, that this latter question incidentally involves the state of the accounts at the time the alleged settlement was made. This may be so. It is unnecessary now to determine whether, upon this issue, the plaintiff would be allowed to investigate the accounts between the parties, with a view to show that the settlement ought not to be enforced. Assuming that such evidence would be admissible, it does not render the issues to be tried referable, on the ground that they involve the examination of a long account. Nor, on the other hand, is it required that the court, upon the trial of these issues, shall investigate these accounts. The second subdivision of the section of the Code, relating to this subject, provides for such a case. If, with a view to enable the court upon the trial to determine whether the alleged settlement shall be held to conclude the parties, it shall be deemed important to ascertain the state of the accounts at the time the settlement was made, the court will be authorized, if it think fit so to do, to order a reference to obtain this information. The referee, in such a case, does not decide the issues between the parties, but merely reports to the court the state of the accounts. Such references are analogous to those which might be made to a master in chancery, under the former system of equity practice, for the purpose of enabling the court to make the proper decree upon the coming in of the report. (See *Palmer a. Palmer*, 13 *How. Pr. R.*, 363; *Graham a. Golding*, 7 *Ib.*, 260.) In the latter case, it was held that the question of partnership must be settled by an issue or by the court, before a reference could be ordered. "Until it is known that there is a partnership," says MITCHELL, J., "it cannot be said that the trial will require the examination of a long account." In *Mills a. Thursby* (11 *How. Pr. R.*, 113), which case, though subsequently reported, was decided previously, the same learned judge had, under the peculiar circumstances of the case, to

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which he refers in *Graham v. Golding*, granted a general order of reference to state the accounts of an alleged partnership. Upon an examination of that case, it will be found, that the pleadings *directly* involved an examination of the accounts between the parties. The partnership agreement was admitted. This agreement was conditional. The plaintiff, if within a specified time he had contributed a certain amount of capital, was a partner; if he had not, then he was not a partner. To determine whether he had complied with this condition or not, an examination of the accounts was deemed necessary. Upon this ground alone, the motion for a reference was granted. The entire issue between the parties depended upon the state of the accounts between them.*

In the case now under consideration, the first issue to be tried is, whether Coffin was ever a partner in the transactions in respect to which an account is sought. If he was not, there is no pretence that an accounting can be necessary. If, upon the trial, this issue should be determined in favor of the plaintiff,

* An issue of fact in an action against a judgment-debtor and his assignee, to set aside an assignment for fraud, and not involving the examination of a long account, cannot be referred except by consent. (*Supreme Ct., Sp. T.*, 1855, *Draper v. Day*, 11 *How. Pr. R.*, 439; but compare *McMahon v. Allen*, 10 *Ib.*, 384.)

A reference can be compelled, only where the court can see that the trial must necessarily involve the examination of a long account. It is not sufficient that in certain exigencies the examination of such an account will be requisite. (*Supreme Ct., Cir.*, 1854, *Keeler v. Poughheepsie and Salt Point Plank-road Company*, 10 *How. Pr. R.*, 11.)

So where in a cause submitted for decision upon the pleadings, it appears that the plaintiff is entitled to an account, but there are questions of fact material to the taking of such account, it may be referred to a referee to take proof, and then upon the pleading and proofs to take a final account. (*Supreme Ct., Sp. T.*, 1854, *Van Zant v. Cobb*, 10 *How. Pr. R.*, 348.)

Where the pleadings put in issue, the question as to whether advances were made by the parties respectively, and to what amount, and the ascertaining of the amounts may be essential on the action, a special reference of those questions is proper, reserving the other issues in the action for a trial by jury. (*N. Y. Common Pleas, Gen. T.*, 1854, *Smith v. Dodd*, 3 *E. D. Smith*, 348.)

But in an action to dissolve a copartnership, and for an accounting, where the answer alleged that on a specified day the accounts were settled and adjusted between the partners, and they had taken no new contracts since, it was held that the issue was not such as to make it improper to send the cause to a referee. (*N. Y. Common Pleas, Gen. T.*, 1858, *Kennedy v. Shilton*, 9 *Ante*, 157, *note*. See also *Cram v. Bradford*, 4 *Ante*, 193.)

As to what constitutes an "account" within the rule, see *Mayor, &c. v. Sharp* (9 *Ante*, 426); *Masterton v. Howell* (4 *Ante*, 118), and cases there cited.

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the court will be at liberty to make an interlocutory order to that effect, and then order that the accounts between the parties be stated for its own information in respect to the other issues, and for that purpose may direct a reference, or it may proceed, without a reference, to determine the other issues. These are questions addressed to the discretion of the court upon the trial.

This motion, therefore, must be denied. The costs of opposing the motion should abide the event of the suit.

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Supreme Court, Seventh District; General Term, March, 1859.

JUSTICE'S JUDGMENT DOCKETED IN THE COUNTY CLERK'S OFFICE.
—ACTION ON JUDGMENT.

An action cannot, without leave of court, be maintained on a judgment of a justice after it has been docketed with the county clerk.

In an action in a justice's court on a judgment recovered in a justice's court, the complaint showed that the judgment had been docketed with the county clerk. The answer claimed that the action could not be maintained, because "under the provisions of the Code, no action can be maintained on a judgment of the county court."

Held, a sufficient statement of the objection that leave of court was necessary.

Appeal from a judgment of the county court affirming a justice's judgment.

The facts are stated in the opinion.

H. R. Selden, for the appellant.

H. J. Thomas, for the respondent.

BY THE COURT.—T. R. STRONG, J.—This action originated in a justice's court. The complaint sets forth the recovery of a judgment by the plaintiff against the defendant, in a court held

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before a justice of the peace in and for the county of Orleans, the filing of a transcript and the docketing thereof in the office of the clerk of said county, and demands a judgment for the amount due on the judgment so recovered, with interest. The answer is, among other things, that "the plaintiff cannot maintain an action upon the judgment set out in the complaint, for this reason—that, under the provisions of the Code, no action can be maintained on a judgment of the county court." On the day to which the trial of the cause was last adjourned, the parties appeared before the justice, and the defendant applied for a further adjournment, which was denied, when the plaintiff proved the judgment on which the action was brought, and the filing of a transcript, and then rested. No evidence was introduced, or question raised, by the defendant at the trial.

It is now made a point by the appellant, that the judgment which is the subject of the action, upon the filing and docketing the transcript, became a judgment of the county court, and therefore, that, under section 71 of the Code, the action would not lie without proof that leave had been obtained from the county court to bring the action. That section provides, that "no action shall be brought upon a judgment rendered in any court of this State, except a court of justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party," &c.

The respondent insists that this point was not made in the court below, and that the appellant is, for that reason, precluded from making it here. We think the question is substantially presented by the answer. The answer is, in substance, that the judgment set forth in the complaint is a judgment of the county court, and that for that reason, under the provisions of the Code, the action would not lie. The only provisions of the Code, relating to the subject of actions on judgments, are those contained in section 71 referred to—so much of which as is applicable to this case is above recited. The plaintiff must have understood the answer to mean, that, under the first clause of that section, this action on the judgment would not lie, because the judgment was a judgment of the county court. The only obstacle to the action there could be under that section, taking that view of the judgment, was, that leave of the county court to bring the action had not been given, as in that section re-

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quired. It was not claimed in the complaint that such leave had been obtained, and the answer obviously pointed, and must have been understood to refer, to that defendant in the case. Undoubtedly, the objection might have been much more plainly expressed; but it was sufficient if, as we think it did, it called the attention of the plaintiff to the necessity of previous leave of the county court to warrant the action.

Upon the merits, we are satisfied that the position of the appellant, that the judgment was a judgment of the county court after the filing and docketing of the transcript, and that by section 71 of the Code, an action would not lie upon it without leave of that court, is sound. When the judgment was rendered, and the transcript filed and docketed, section 56 of the Code of 1848 was in force, and provided, that "a justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon, and entered in the docket, and from that time the judgment shall have the same effect as a lien, and be enforced in the same manner as a judgment of the county court," &c. In 1849, the section was amended by striking out that part of the section relating to the effect of the judgment as a lien, and the manner of enforcing it, and substituting therefor the words, "shall be a judgment of the county court." (See section 63 of the present Code.) This change of phraseology does not, we think, change the substance of the provision so far as the question in this case is concerned. If the amendment had not been made, the case would be within section 71, and, if so, there can be no doubt of the validity of the amendment in reference to this judgment, if otherwise such doubt might be entertained. The new matter must be regarded as law only from the time it was introduced (*Ely v. Holton*, 15 *N. Y.* (1 *Smith's*) *R.*, 595); but if it is substantially the same as the old matter superseded by it, the power of the Legislature to make the change, and that the provision as it stands is applicable to cases of judgments of which transcripts were filed and docketed before the change, as to those which are subsequent, is clear.

Ample provision was made by section 56 of the Code of 1848,

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as by section 73 of the Code in its present form, for enforcing justices' judgments, where transcripts were filed and docketed, in any county in the State; and every reason which existed for prohibiting actions on judgments of courts of record, without leave, applied to such justices' judgments. No action upon them, except in special cases could be necessary.

These views require a reversal of the judgment of the county court, and of the justice.

PEGRAM *a.* CARSON.

New York Superior Court; General Term, January, 1860.

DISCOVERY AND INSPECTION.

On an application for discovery, enough must be shown to satisfy the court that there is reason to believe that the documents sought do in fact contain material evidence. Merely showing a belief that the papers in general of the plaintiff contain matter which would help the defence, is not sufficient.

It must also appear that the party does not possess other means of proof.*

* In addition to the authorities cited by the court, the reader may refer to the following :

The papers and documents must be specifically set forth. (Jackling *a.* Edmonds, 3 *E. D. Smith*, 539; and see Watson *a.* Renwick, 4 *Johns.*, 381.)

A general discovery of all the books and papers of the adverse party should be denied. (Cassard *a.* Hinman, 6 *Duer*, 695.)

Plaintiff may have an order for discovery, in order to enable him to furnish a bill of particulars. (Prince *a.* Currie, 2 *How. Pr. R.*, 119.)

An administrator was allowed to have a discovery of defendant's books and papers, though the complaint was on a promise to the administrator, and not to the decedent. (Mathis *a.* Vanderbilt, 2 *Abbotts' Pr. R.*, 387.)

The application must show a necessity for the discovery. (Stanton *a.* Delaware Mutual Insurance Company, 2 *Sandf.*, 662.) The applicant's opinion on the point is not enough. (Wilkie *a.* Moore, 17 *How. Pr. R.*, 480.)

Where an ordinary notice to produce on the trial would be sufficient, the order was denied. (McKeon *a.* Lane, 2 *Hall*, 520; and see Van Zant *a.* Cobb, 12 *How. Pr. R.*, 545.)

An order for discovery will be denied if it is manifest that the applicant can have no defence which he cannot, without the papers sought for, set up in due

Appeal from an order denying a discovery of books and papers.

The facts are stated in the opinion.

BY THE COURT.—HOFFMAN, J.—The action is to recover a quantity of corn, which it is alleged was the property of the plaintiff, and to the possession of which he was entitled. That about the 1st of August, 1857, the defendants wrongfully possessed themselves of a part thereof, and, on the 25th of August, of the remainder. A demand and refusal is stated. The answer set up an ownership in the firm of Starling, McCulloch & Co., and a right to hold the corn under them.

The petition states that the plaintiff resides in St. Louis, Missouri, and has in his possession, or under his control, books of account kept by him in the year 1857, and prior to the 26th of August, containing entries of his accounts and transactions with the firm of *Starling, McCulloch & Co.*, and also entries in relation to the corn in question.

Also letters written to him by said Starling, McCulloch & Company, or one of the members of that firm, during the same year, and prior to the said 26th of August.

Also copies of letters written and sent by the plaintiff to the said Starling, McCulloch & Company, or one or other of the members of that firm, in the said year, and prior to the said 26th of August.

Also copies of telegraphic communications, which passed between him and said Starling, McCulloch & Company, or one or other of the members of that firm, in the said year, and prior to the said 26th day of August.

The petition then states that the petitioners are advised by their counsel, and verily believe, that a discovery of all the aforesaid entries in all books of account of the plaintiff, and of all the letters, and copies of letters, and telegraphic communi-

form to raise the proper issues. It is not to be granted to protect him from answering untruthfully. (*Mora a. McCredy*, 2 *Bosw.*, 669.)

An order for the production of copartnership books which belong equally to both parties to the suit, may be obtained as a matter of course, where the defendant swears that he is unable to answer fully without an inspection. (*Chancery*. 1842, *Brush a. Anderson*, 2 *Chan. Sent.*, 71 ; and see *Kelly a. Eckford*, 5 *Paige*, 548.)

See also *Higgins a. Bishop*, 12 *N. Y. Leg. Obs.*, 127 ; *Crary a. Smith*, 2 *Comst.*, 60.

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cations above mentioned, is material and necessary to enable them to prepare for the trial of this action ; that, by such discovery, they verily believe it will appear that Starling, McCulloch & Company were the owners of, or interested in, the corn in controversy, either jointly with the said plaintiff or otherwise, and were largely in advance to the said plaintiff on account of the same, and had a right to pledge the same to the said defendants, as they did pledge the same.

The statements of the petition, therefore, amount to this: The defendants believe the plaintiff has books, letters, or copies of letters, and telegraphic communications in his possession or control, which will, as the defendants believe, show some title in Starling, McCulloch & Company to the corn in question, and which they are advised by counsel are material and necessary for their defence on the trial. The substance is this, and nothing more: we believe your books and letters will help our defence, and, if they do, it is material for us that you should show them.

There is no allegation of knowledge, or of information from any one, as to the contents of one entry, or of one letter, or communication being pertinent to the question in issue. It is difficult to imagine any statement more vague and indefinite than this.

In *Hoyt v. American Exchange Bank* (1 *Duer*, 602 ; S. C., 8 *How. Pr. R.*, 89), a leading case in our own court, the discovery was directed to entries connected with the post-note, and Indiana bonds, the subject of controversy in the action. In *Terry v. Nubel* (12 *N. Y. Leg. Obs.*, 146), I had occasion to examine the original petition in *Hoyt v. American Exchange Bank*, which is not stated in the report. The prayer was, that the defendants might give sworn copies of all entries in any books, &c., in reference to, or showing where, under what circumstances, for what purpose, or consideration, and by and from what person or persons, the post-notes of the Morris Canal and Banking Company, and the seventy-three bonds of the State of Indiana, mentioned in the petition, were severally transferred or came into the possession of the defendants. The petition set forth that the defendants had books containing evidence relating to the merits of the cause, *and to the facts aforesaid*, a schedule of which books were thereto annexed ; that the

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same would prove the allegations of the complaint. The order was nearly in the language of the prayer. Upon an application for a more full and perfect discovery, upon an allegation of the insufficiency of what had been given, an order was made at special term, giving power to a referee to call for and examine all books, papers, and documents in the defendants' possession or control, containing entries in reference to the discovery ordered by the previous order. This order was as unlimited, indefinite, and sweeping as that we are asked to make in the present instance. Except as to the matter of reference, it would serve as a precedent for this case. Upon appeal to the general term it was discharged, and the course pointed out for the dissatisfied applicant to move for a further discovery in definite particulars, which the return or other papers may induce the court to believe the party has in his possession, and which relate to the matters as to which a discovery has been ordered, and whose existence was shown to be probable.

The view of the subject taken by Mr. Justice Harris, in *The Commercial Bank of Albany a. Dunham* (13 *How. Pr. R.*, 561), is applicable to this case. "The plaintiffs specify no entry, or book even, which they propose to use as evidence upon the trial. They ask for license to search, at their own pleasure, all the books in which all the transactions of the defendants have been recorded for a period of eight years, in the expectation that, somewhere within the wide range, they may find some evidence that will aid them in sustaining the issue upon the trial."

Justice Ingraham, in *The People a. The Rector, &c., of Trinity Church* (6 *Abbotts' Pr. R.*, 177), has expressed himself with equal decision against the right of a party to a discovery, upon allegations in a petition not more vague and indefinite than those in the present case.

In *Davis a. Dunham* (13 *How. Pr. R.*, 425), the court, at general term, in the third district, held that the facts and circumstances must be stated sufficient to satisfy the court, or officer to whom the application is made, that there is reason to believe that the books, &c., which the party seeks to examine, do, in fact, contain material evidence.*

* This principle was further illustrated in the following cases. *GRAY a. KEN-*

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The case of *Gould v. McCarty* (1 *Kern.*, 575), must be adverted to. The petition was nearly as indefinite and sweeping as that in the present instance. In addition to the comments of Mr. Justice Ingraham (*People v. Rector, &c., ut supra*), upon

DALL (*N. Y. Superior Ct., At Chambers, May, 1860*). In this case, a discovery was allowed only as to matter in respect to which plaintiff might be entitled to relief. The nature of the action is fully stated in the opinion.

Buckham, Cady & Smales, for the motion.

George W. Parsons, opposed.

HOFFMAN, J.—The firm of Ely, Bowen & McConnell made a general assignment to the defendant, Kendall, of all their property, to pay their creditors *pro rata*.

The plaintiffs are among such creditors. They bring this action to remove him from his situation as assignee, and have a receiver appointed. The prayer for judgment is limited to this.

The members of the firm were, Henry C. Bowen, special partner, and Henry G. Ely, Edward E. Bowen, and William H. McConnell, general partners.

A petition is now presented for a discovery of books and papers. The discovery is asked from Ely, of books and papers relating to the property and transaction of the firm of Ely, Clapp & Bowen. He swears that he has not the possession or control of any such books, but that they were delivered over to, and remain in possession of Kendall.

It is asked of the defendant, Henry C. Bowen, as to books, &c., connected with the business of the firm of Ely, Clapp & Bowen, and Ely, Bowen & McConnell, who also denies possession or control of such books, having only access to them as a partner.

The allegations of the complaint as to the misconduct of Kendall in relation to which the books may furnish evidence, are mainly these :

I. That he has employed others to attend to the business, instead of doing it himself, and has allowed them to draw large sums of money out of the trust-funds at their discretion.

II. That the charge of \$15,000 for expenses was needlessly incurred.

III. That the firm of Ely, Bowen & McConnell carried on business at the store No. 324 Broadway, which store, and lease thereof, belonged to Bowen, McNamee & Co., holding it at a yearly rent of \$13,000, for a term of five years, unexpired. A series of transactions between the two firms, with the consent of the assignee, is then stated, the effect of which was to create an unjust and unlawful credit of \$20,000, in favor of Bowen, McNamee & Co., upon which they have received a dividend. There is nothing in the petition, complaint, or affidavits, to show that this transaction cannot be fully established by testimony independently of the books ; indeed, there is nothing to show that the books would even assist in ascertaining the facts. Taking the admissions and statements in Kendall's answer, it is quite plain that the plaintiffs have other means, if any exist at all, besides the books, to make out this part of his case.

IV. That previous to the formation of the firm of Ely, Bowen & McConnell, the defendants, Ely and Edward E. Bowen, were partners in a firm of Ely, Clapp & Bowen, in which Henry C. Bowen was a special partner, having contributed \$20,000 as capital, which firm ceased to do business on the 1st of January, 1856. The stock of merchandise was sold to Ely, Bowen & McConnell, on the 1st of January,

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the case, it should be noticed that the defendant submitted, to some extent, that the order should be made by admitting possession of "a private book, in which he made short entries of the purchase and sales of stock, or contracts therefor, and his

1856; the sum of \$20,000 of the money of the latter firm was passed to the credit of Ely, Clapp & Bowen, and drawn out by said Henry C. Bowen, as his special capital therein, leaving a large amount of debts and liabilities unpaid. Such firm of Ely, Clapp & Bowen was then insolvent, and the business of the last two years had resulted in a loss, as shown by their books and balance-sheets, and such insolvency was known by said Henry C. Bowen. The allegation founded on this and some other details is, that Henry C. Bowen had made himself a general partner in the firm of Ely, Clapp & Bowen, and liable for the debts thereof; that the assignee, though acquainted with all these facts and circumstances, has not taken measures to enforce payment of debts from said Bowen. The objection of the defendant's counsel, that the general assignee cannot impeach a transaction which his assignors could not do, is decisive. The defendant could not be removed for neglecting what he could not attempt. (10 *Paige*, 210; 7 *Barb.*, 466.)

V. That immediately before the assignment, Ely, Bowen & McConnell, in pursuance of an arrangement made by Ely and Henry C. Bowen, passed over to Bowen, McNamee & Co., about twenty-nine thousand dollars' worth of merchandise, and about seventy-two thousand dollars' worth of promissory notes, and mercantile securities, with the design and intent to prefer that firm over the other creditors of said Ely, Bowen & McConnell. The defendant was culpable in not recovering this property. The answer given under the last head applies to this case. Besides, the facts are sufficiently admitted in the answers to raise the question. The details can be proven, if necessary, without the books.

VI. That after the assignment, the defendant Ely retained a large amount of promissory notes belonging to Ely, Bowen & McConnell, which ought to have been taken possession of by the assignee; that he disposed of the proceeds thereof for his own use, and in payment of creditors whom he had promised to prefer. It is not shown that this matter cannot readily be proven without the books.

There are a few other matters stated in the complaint, not of moment on this application.

I have gone carefully over the complaint and petition. I cannot see reasonable ground for any discovery within the rules of the court, except as to the expenses of \$15,000, and the allowances to Ely and Edward H. Bowen, McConnell, and the bookkeeper.

The only order that can be made is, that the defendant, Kendall, furnish to the plaintiff's attorney, in ten days from service of copy of this order, sworn copies of all accounts and entries in any books or papers in his possession, or under his control, relative to his expenditure in relation to the said assigned estate; and also in relation to the money allowed the defendants, Henry G. Ely, Edward H. Bowen, and William H. McConnell, and to the bookkeeper of the firm, out of the trust-funds which have come to his possession, or under his control.

Order accordingly.

LYNCH *a.* HENDERSON (*Supreme Court, First District, Special Term, March, 1859*). This action was for libel, and plaintiff moved for an order for delivery of a copy of a printed book to him, to enable him to prepare his complaint.

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ordinary check-book kept in the usual manner." An order, at special term of this court, directed an unlimited delivery of sworn copies of all entries, and papers containing entries, relating to the merits of the action. But, on appeal, the general term limited the discovery to the entries and memoranda in his check-book, or private memorandum-book, mentioned in his affidavit read in opposition. A subsequent judgment, had on disobedience of this order, was carried, by appeal, to the Court of Appeals, and the order there examined, and judgment affirmed. The points decided by the Court of Appeals were, that the Revised Statutes, as to discovery of books and papers, were yet in force, and not superseded by the Code, and that the Superior Court had the same authority as the Supreme Court under them.

There is another point equally decisive against the defendants, and to support the order appealed from. There is not, in the petition, a statement to show that the defendant does not possess the means of proving, by other competent evidence, the title or interest of the firm of Starling, McCulloch & Company, which will enable him to sustain his case. The opposing affidavit shows that one of the firm can be readily reached as a witness.

We consider some allegation of this nature to be indispensable.

In *Stalker v. Gaunt* (12 *N. Y. Leg. Obs.*, 132), the subject was much considered. It was observed, in the next place, discovery was the mere instrument for obtaining evidence to make a legal right available, without pronouncing a decision on that right. (*Hare on Discovery*, p. 110.) Hence it was essential

INGRAHAM, J.—The plaintiff moves for an order compelling the defendant to deliver to him a copy of a printed book in his possession, on the supposition that it contains libellous matter against the plaintiff, in order to enable him to prepare his complaint in this action.

Without expressing any opinion as to the propriety of compelling a defendant in an action for a libel to deliver to the plaintiff a copy of the libel, I am clearly of the opinion that this motion should not be granted, because :

1. The affidavits do not show what is stated in the book of which the plaintiff seeks a discovery, and, therefore, the Court cannot decide whether it is material or not.

2. Because the affidavits do not specify any particular information desired, so that the Court could order a sworn copy to be delivered.

3. Because the plaintiff is not entitled to the whole book, but only to the particular article on which his action is founded.

Motion denied, without prejudice to another motion, on payment of \$10 costs.

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that a bill for that purpose should state that it was in aid of some judicial proceeding. (Attorney-general *a.* Rose, 8 *Price*, 205; Conderte *a.* Watkins, 5 *Mad.*, 18.) "The Revised Statutes do not change this principle. There must be a suit pending in the Supreme (or other) Court when the petition is presented. The change, by permitting an application to the common-law court itself, instead of resorting to another tribunal, is but matter of convenient practice.

"Now, the foundation of such a bill was the inability of the party to establish his case without the discovery. It is said, generally, that it lies because he cannot otherwise prove the facts, or in aid of proof. The meaning of the last clause I take to be, that the aid is necessary in order to establish one or more facts in a series of facts which the party must prove, or to supply a partial defect in the testimony as to one or more of such facts, or as to the single fact on which the right depends. Whether the suit was in the Court of Chancery, or in another court, was immaterial as to the rules which governed discovery."

I have carefully examined the following authorities: Seymour *a.* Seymour (4 *Johns. Ch. R.*, 410); Gelston *a.* Hoyt (1 *Johns. Ch. R.*, 543); Leggett *a.* Postley (2 *Paige*, 599); Newkirk *a.* Willett (2 *Cal. Cas.*, 296); March *a.* Davidson (9 *Paige*, 580); Bass *a.* Bass (4 *Hen. & Mumf.*, 465); Lowe *a.* Stebbins (9 *Paige*, 624); Vance *a.* Andrews (2 *Barb. Ch. R.*, 370); Duvall *a.* Ross (2 *Mumf.*, 290); Norwalk Railroad Co. *a.* Story (17 *Conn.*, 213). While there are to be found some modifications of the rule, yet I apprehend that the rule stated in the explicit language of the chancellor, remains to this day substantially the doctrine upon the subject. "If a bill seeks discovery in aid of the jurisdiction of a court of law, it ought to appear that such aid is required. It is not denied, in this case, that every fact material to the defence at law, can be proved by the ordinary means at law, without resorting to the aid of this court. I should presume, from the bill, that every material fact respecting the ownership of the vessel could be established without coming to this court; and such trials are not to be delayed, and discoveries required, when the necessity of such delay and discovery is not made to appear." (Gelston *a.* Hoyt, 1 *Johns. Ch. R.*, 546.)

The power, under the Code, to examine parties as witnesses, was then adverted to, and it was concluded:

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"Two important principles appear to me deducible from this examination of the subject. If the discovery is attainable by competent and available testimony, other than that of the party, a production of books and papers should not be allowed, except under special circumstances. If it is attainable by the examination of a party as a witness, it should be also refused, except upon some special ground."

The results in this case are fully approved of, and acted upon, by Mr. Justice Harris, in *The Commercial Bank v. Dunham*, before cited.

And, in *McAllister v. Pond* (15 *How.*, 299; 6 *Duer*, 702), Mr. Justice Woodruff says: "One of the first facts which should appear, on an application for the discovery of books or papers for the purpose of preparing for trial, is, that the applicant has not in his possession the same information, or if he has, that he has not the means of establishing, by other available proof, the contents of such books and papers."

Again: "It is not stated that the plaintiff cannot prove, without the production sought, every fact which is material to his case."

We consider the present application to be entirely against settled rules, and that the order below ought to be affirmed; nor is there any thing in the case to justify our giving the party an opportunity to renew it.

MATTER OF THE GRADUATES.

Supreme Court, First District; General Term, May, 1860.

ATTORNEYS.—ADMISSION TO THE BAR.—CONSTITUTIONAL LAW.

The Legislature have no power to confer upon any other body than the Supreme Court the right and power of ascertaining and determining the qualification and admission of candidates for the bar.

The act of April 6, 1860 (*Laws of 1860*, ch. 187), providing that any graduate of the Law Department of the University of the city of New York, shall be admitted, upon his diploma, to practise,—is unconstitutional.

Reversed,
14 Aug. 30th;
19 Nov. 9th; 20
17 May 60.

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In the matter of the admission of the graduates of the Law Department of the University of the city of New York to practise as attorneys and counsellors of this court.

BY THE COURT.*—SUTHERLAND, J.—A motion is made in behalf of twenty-two young gentlemen, graduates of the Law Department of the University of the city of New York, for their admission to practise as attorneys and counsellors of this court, under a recent act of the Legislature of this State. (Chap. 187, passed April 6, 1860.)

The act is entitled "An act with reference to the University of the city of New York."

The first section of the act is as follows: "The faculty of law of the University of the city of New York, are hereby constituted a committee, upon whose examination and recommendation, as evinced by the degree of Bachelor of Laws, conferred upon their recommendation by the council of the University, any graduate of the Law Department shall be admitted to practise as attorney and counsellor at law in all the courts of the State; but no diploma shall be sufficient for such admission, which shall be given for a period of attendance upon said Law Department less than three terms of twelve weeks each, or than two terms of twelve weeks each, with one year's study of the law elsewhere."

This motion is made on the certificates of the individuals composing the faculty of law of the said University, certifying that these twenty-two young gentlemen "have attended the Law Department of the said University for two terms of twelve weeks each, and have pursued the study of law one year elsewhere;" and further certifying, that upon their recommendation, after a thorough and critical examination by them, the council of the University had conferred upon these young gentlemen the degree of Bachelor of Laws.

We are inclined to think that the diplomas themselves should have been produced, as the best evidence of their having been conferred on the applicants; but as the certificate leaves no room for doubt that the diplomas have been conferred on the applicants in accordance with the act, we should at once direct

* Present, SUTHERLAND, P. J., LEONARD and MULLEN, JJ.

an order for their admission to be entered on the production of their diplomas, and filing the certificate, if there were not other and more serious objections to their admission under this act.

After a careful examination of the question, we think the Legislature had no constitutional right or power to pass the act, and thus take away from this court the right and power which it has heretofore exercised, of ascertaining and determining for itself, and under its own rules and regulations, whether the applicants are of the class or description of persons by the constitution entitled to admission, and have the requisite constitutional qualifications of learning, and ability, and moral character.

By Section 8, of Article VII., of the Constitution: "Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practise in all the courts of this State."

We think the act in question conflicts with this provision of the constitution in more than one respect.

1. The constitution in effect declares, that the applicant to be entitled to admission must be a male citizen, and of the age of twenty-one years.

The act in effect declares, that any graduate of the Law Department of the University, irrespective of sex, age, or citizenship, upon whom the diploma has been conferred under the circumstances mentioned in the act, shall be admitted to practise, &c. (See *McKeon v. Devries*, 3 *Barb.*, 196.)

If the act is constitutional and valid, on application for admission under it, it would appear to leave for the court a ministerial, formal duty only, and which could as well be performed by the clerk or the crier as by the court.

The act would appear to make the diploma conferred by the council of the University conclusive evidence to the court, not only that the applicant is possessed of the requisite qualifications of learning, ability, and good moral character, but also, that the applicant is of the age of twenty-one years, and a male citizen; thus taking from the court all right of inquiry into any of these circumstances, and all judicial discretion and control as to or over the applicant's admission.

If constitutional, the act is in effect a legislative mandamus

to the court *to admit*, on the presentation of the diploma, and satisfactory evidence that it had given for a period of attendance upon the Law Department of the University, or of such attendance with one year's study of the law elsewhere, not less than that specified in the act.

This mere ministerial duty, which the act would appear to leave the court, and which this motion assumes the court should perform in the usual way, by directing an order for the admission of the applicants to be entered, and by granting them the usual diplomas or licenses to practise, would appear to be not only useless, but inconsistent:—useless, because, if the diploma of the council of the University is, or should be, sufficient evidence of the applicant's constitutional qualifications to authorize the court to grant its license, then the diploma of the council of the University is, or should be, sufficient evidence of the applicant's qualifications and right to practise, without any other, or further diploma from the court; and inconsistent, because the license or diploma of the court would be, or ought to be, substantially a certificate, that the applicant has the constitutional qualifications and right to practise; but how can the court give this certificate on the mere certificate or diploma of the council of the University, which certificate or diploma of the council has been conferred on the mere certificate or recommendation of the faculty of law of the University, a body constituted or composed no doubt of individuals of great learning and discretion, but not appointed or appointable by, or deriving any authority from the court, and in no way controllable by or responsible to the court?

Indeed, if the Legislature had the constitutional right and power to constitute the faculty of law of the University a committee to ascertain, determine, and certify to the constitutional qualifications of the applicants, and intended to do so by this act, why was the act so worded as to require or imply that an application for *admission* should be made to the court, and that the court should also grant a diploma or license? If the main purpose of the act was authorized by the constitution, why was the mere useless ceremony of an application for, and of the court's granting a license retained? What higher authority, or better evidence of his right to practise, on taking the oath of office, could the applicant have or require, than the constitution,

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the act of the Legislature, and the diploma specified in the act, and conferred on him under the circumstances specified in the act? Is not the application for admission to, and the granting of a license by, the court, which this motion assumes to be required, and which probably is required or implied by the act, inconsistent with the main purpose of the act?

2. We are inclined to think, that the proviso or condition of the act, which declares that no diploma (of the council of the University) shall be sufficient for such admission, unless given for an attendance upon the Law Department of the University, with or without one year's study of the law elsewhere, for not less than certain terms or periods specified in the act, brings the act in conflict with the constitutional provision, and may in effect be considered as nullifying the act.

The constitution prescribes no term or period of clerkship, or of study, or standard of learning or ability, upon or by which the applicant is to be examined, admitted, or rejected. On the contrary, it is plain that the constitution intended to regulate and limit the power which the court then had over the admission of attorneys, &c., and to abolish the right and practice of requiring by certain prescribed rules and regulations a certain period of clerkship, or study of the law, as a preliminary or condition to the right of an examination for admission. The constitution says, "*any* male citizen of the age of twenty-one years, of good moral character, &c., *shall* be entitled," &c. If the applicant for admission is a citizen, and of the age and sex mentioned in the constitutional provision, the constitution in effect appoints him to the office of attorney, &c., upon his character and the extent and sufficiency of his learning and ability being ascertained and passed upon favorably. The constitutional provision would certainly appear to be inconsistent with any right of the Legislature or of this court to impose upon the candidate for admission the terms or conditions of attendance upon the Law Department of the University, specified in the act in question, or, indeed, any prescribed course or term of study or preparation at the University, or elsewhere, as a condition of examination. The act declares that the diploma conferred by the council of the University, *shall not* be sufficient evidence for the applicant's admission, unless given for a period of attendance upon the Law Department, &c., of not less than that

specified in the act. Then, conceding that the Legislature had the constitutional right to declare that the diploma of the council of the University should be sufficient evidence of the qualifications and right to admission of the law-students of the University, why does not this unauthorized condition of a certain period of attendance upon its Law Department, imposed by the statute, whether for the benefit of the students, the profession, the professors, or the University, it is unnecessary now to inquire, completely nullify the act? The act would appear to present an instance of a legislative *felo de se*.

It is certainly quite clear, if this proviso or condition does not destroy the act, and the Legislature had the right to declare that the diplomas conferred by the council of the University should be sufficient evidence, &c., that the applicants should be admitted on the presentation of their diplomas alone, and without requiring of them any evidence of a certain period of attendance upon the Law Department of the University, or of the study of the law elsewhere.

3. But the important question raised by this motion is, whether the convention which framed the constitution, did not intend, by the provision before quoted, to leave or vest in this court the appointment of its attorneys and counsellors, and the strictly discretionary and *quasi* judicial power and corresponding duty, of ascertaining and passing upon the constitutional qualifications required for appointment to those offices implied in the right of appointment. This is the important question, because the Legislature, if it has the right to confer this discretionary power on the faculty of law, or council of the University of New York, has the right to confer it on any committee, tribunal, person, or officer; and the Legislature may not always exercise this right as discreetly as they have by the act in question.

We are inclined to think, from the express words of the provision of the constitution, that the intention of its framers was to leave or vest in this court the right of appointing its own attorneys and counsellors, and the right of ascertaining and passing upon the requisite qualifications of applicants, by and through its own committee of examination.

The words of the constitution are, "Any male citizen of the age of twenty-one years, &c., of good moral character, and who

possesses the requisite qualifications, &c., shall be entitled to *admission*," &c.

Shall be entitled to admission by whom? By whom but the court? What does the word *admit*, or do the words *to admit*, mean? To grant leave; to grant leave to enter into. Does not the right of granting leave, imply the right of refusal of leave; and do not the words of the constitution plainly imply that the court shall have this right; and does not this right or power of granting or refusing leave, imply, in the absence of any other express provision of the constitution on the subject, the right and duty of ascertaining and passing upon the qualifications of applicants for admission? If the words of the constitution had been, "shall be entitled to admission" *by the court or courts*, there could not have been a doubt that the provision was intended to leave with the court, subject to the limitations or restrictions implied by the provision, the whole subject of the admission of its attorneys and counsellors, and the exclusive power and duty of passing upon their qualifications, and the right of admission.

Suppose the constitution declared that any stenographic reporter, of the requisite qualifications, &c., should be entitled to enter the halls of the Legislature for the purpose of reporting its proceedings: would not such a declaration or provision imply and vest in the Legislature the *quasi* judicial power and discretion of passing upon the qualifications of every reporter who applied for admission, or leave to enter, for such purpose?

A brief reference to the circumstances under which the provision in question was inserted in the constitution, would appear to leave no room to doubt that it was the intention to leave with the courts the power, discretion, and duty in question.

The constitution of 1777 (sec. 27) gave the appointment of attorneys, &c., to the courts, without any limitation. Under it, the court could admit minors or aliens; the court having and exercising indeed full discretion and power over the whole subject. (1 *Johns.*, 528; 4 *Ib.*, 192.)

The constitution of 1822 does not allude to the subject, nor indeed to the power or jurisdiction of the Supreme Court, simply speaking of it as a court already in existence. (Article 5, sec. 4.)

By the Revised Statutes, attorneys, &c., were defined to be, not only public officers, but judicial officers; and in the absence

of any provision made for their appointment in the constitution of 1822, the Revised Statutes declared, that they should be appointed and licensed to practise by the several courts in which they intended to practise, and that the Supreme Court should prescribe the rules and regulations under which they should be appointed and licensed in that court. Previous to the Revised Statutes, they were considered, and had been judicially held to be, not only officers of the court, but public officers. (1 *Hopk. Ch. R.*, 6; 2 *Cow.*, 13.) Section 3 of article 6 of the constitution of 1846, declares and confirms the general jurisdiction of this court; and section 5 of the same article must operate, and was probably intended to operate, as a limitation of the powers of the Legislature over its jurisdiction and proceedings; then follows, in connection, the provision in section 8 of the same article, in relation to the admission of attorneys and counsellors to practise. This provision of the constitution of 1846 must be presumed to have been adopted with knowledge of this power of the court, and of the rules and regulations which had been prescribed by it, and then in force, under which it was exercised.

This provision of the constitution of 1846 should be looked upon as a mere limitation or regulation of a recognized and conceded power of the courts; and the principle which should control its construction is, that the mere limitation or regulation of a political or governmental power or trust by the sovereign power (for the convention which framed the constitution represented, and the people who ratified it were and are, the sovereign power, and not the Legislature), should be considered as leaving and confirming the power as thus limited or regulated in the tribunal or officer, exercising, and authorized to exercise such power, in the absence of any express declaration or provision of the sovereign power to the contrary, or inconsistent with such construction.

To adopt this principle in the construction of this provision of the constitution, would be merely recognizing and applying, in its construction, the common-law principle in the construction of a statute altering or modifying a common-law rule, or impairing a recognized right, viz.: that such statute is not to be deemed as intended to alter or modify the common-law rule, or impair the right, any further than the express words of the statute demand.

If the Legislature has the power assumed by passing the act in question, it must be under the general grant of legislative power in the constitution, or under the provision (art. 10, sec. 2) which expressly gives the Legislature power to provide for the election or appointment of all officers whose election or appointment is not provided for by the constitution, and all officers whose offices should thereafter be created by law.

When the constitution grants a power, or enjoins the performance of a duty, it is useless and nugatory for the Legislature to do the same thing, for the constitution is supreme. The constitution and the act in question both say that certain applicants shall be admitted to practise as attorney, &c. The constitution leaves nothing to be ascertained and passed upon judicially, but the qualifications of the applicants. It is very clear, therefore, that the act can have, and was not intended to have, any other or further force or effect, than to confer on the faculty of law of the University the discretionary or judicial power of ascertaining and passing upon the qualifications of the applicants, and to make the diplomas of the council of the University evidence of the sufficiency of their qualifications, instead of the license or diploma of the court.

Now it will hardly be claimed that the Legislature had the right to confer this power, under the general grant of the power of legislation. The general provision before adverted to (art. 10, sec. 2), giving express power to the Legislature to provide for the appointment or election of all officers whose appointment or election is not provided for by the constitution, would go to show that the right to pass the act could not be claimed under the general grant of legislative power. By the very terms of the provision in art. 10, sec. 2, it does not give the right, if the appointment of attorneys, &c., is provided for in section 8 of art. 6.

We have given our reasons for thinking that the last-mentioned section, construed in connection with sections 3 and 5 of the same article, declaring and confirming the general jurisdiction of the court, and limiting the powers of the Legislature over its jurisdiction and proceedings, do give to, or confirm in the court, the right of appointment, and the exclusive power of ascertaining, through a committee of its own, or otherwise, the qualifications of all applicants.

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If we are right in our views of the question, it follows that the Legislature had no power to pass the act in question.

If the power is in the court, it is a public trust, and the court has no right to surrender it, or the Legislature to assume it, or confer it on any committee, person, or officer, constituted or appointed by it.

In this day of easy legislation, and of omnipotent majorities, it is the duty of this court to ward off all unauthorized attacks by the Legislature on the legitimate powers or jurisdiction of the court.

We do not say that we have not the *power* to consider the diplomas conferred on the applicants under the act sufficient evidence of their qualifications, and to admit them on furnishing the evidence of citizenship, age, &c., required by the second rule of the court; or if thus admitted and licensed by the court, that their right to practise could be questioned on the ground of the unconstitutionality of the act.

An imperfect or improper exercise of a power of appointment may not, in all cases, affect the appointee's title.

But we do intend to say, that, in our opinion, the Legislature had no right to declare that the diplomas conferred under the act *shall* be sufficient evidence of the requisite learning and ability of the applicants, and *shall* entitle them to admission, either with or without the evidence of moral character, citizenship, and age, required by the second rule of the court; or with or without evidence of their attendance in the University, and of their study of law elsewhere, for the period or terms mentioned in the act; and that, in our judgment, they ought not to be admitted without submitting to the usual examination, which they, or such of them as desire it, can have at an early day, by complying with the second rule of the court.

In the matter of the application of several graduates of the Law School of Columbia College to be admitted to practise as attorneys and counsellors of this court.

On a subsequent day of the term a similar application was made to the court on behalf of graduates of the Law School of Columbia College.

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Prof. Dwight, of the faculty of the Law School, made the following points in support of the application.—I. By the common law the court had no power to admit an attorney.

II. The power of the court to do so rests solely upon statute, both in this country and in England. During the colonial period, down to 1777, the governor of the State issued a command to the justices to admit, which command the justices obeyed.

III. That the act of April 7, 1860, under which the applicants claimed to be entitled to admission, was within the legislative power.

BONNEY, J.—By the act entitled “An act relative to the Law School of Columbia College,” passed April 7, 1860, it is enacted, that the professors in the Law School of Columbia College, and the law committee of the trustees of said college, are constituted a committee, any three of whom, being counsellors at law, shall form a quorum, upon whose examination and recommendation, as evidenced by the diploma of said college, granted upon such recommendation, *any graduate of said Law School shall be admitted to practise as an attorney and counsellor at law, in all the courts of this State*; and that no diploma shall be sufficient for such admission, which is given for any period of attendance upon the said school for a term less than eighteen months; but this period of eighteen months shall not apply to the members of the present senior class in said Law School, who *may be admitted* to practise as aforesaid upon the examination and recommendation of said committee, and upon the evidence of the diploma of the college; and all acts and parts of acts inconsistent with said act are repealed.

Under this act, several members of the present senior class of Columbia College now apply to be admitted to practise in this court.

They present to the court, as evidence of their right to such admission:

1. A certificate, dated 21st May, 1860, made by the law committee of said college, to the effect, that said committee, being severally of the degree of counsellor at law in this court, and having, with the assistance of the professor of municipal law in said school, duly and thoroughly examined the several persons

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therein named, being members of the present senior class of said Law School, do find, certify, and report them, and each of them, to be well and sufficiently qualified to receive the diploma of Bachelor of Laws from said college, to practise as attorney and counsellor at law in all the courts of the State of New York.

2. An order of the trustees of the college, dated 21st May, 1860, whereby, after reciting that the same persons named in said certificate were duly recommended for the degree of Bachelor of Laws, it is ordered, that the degree of Bachelor of Laws be conferred on them.

3. Diplomas of said college, dated 22d May, 1860, by which the trustees of the college declare and make known :

That, under the authority of their charter and of the act of April 7, 1860, above-mentioned, they have caused the same persons named in said certificate and order, being members of the present senior class of the Law School of the college, to be examined by the professor of said school, and by the law committee of the college; that the said examiners have recommended such persons as in all respects fully qualified to receive the degree of Bachelor of Laws; and that on such examination and recommendation, said trustees admit such persons respectively to said degree, conferring on them all the rights and privileges anywhere recognized as belonging to that degree—constituting them graduates of said Law School—and granting them such diploma, *as evidence that they respectively are entitled to said degree, and also, pursuant to the provisions of said act, to be admitted to practise as attorneys and counsellors at law in all the courts of the State of New York.*

The constitution of this State, adopted in 1846, provides (Article 6, § 8), that “*any male citizen, of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practise in all the courts of this State.*”

The Revised Statutes of 1830 provide, that counsellors, solicitors, and attorneys shall be *appointed and admitted to practise* by the courts in which they intend to practise; that the *Supreme Court shall* prescribe the rules and regulations under which counsellors and attorneys shall be appointed and licensed therein; that no person *shall be admitted unless approved by the*

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court for his good character and learning; that, on admission, they shall take and subscribe the oath of office, and that they shall be regulated by the rules and orders of the court, and subject to be removed or suspended by the court for any deceit, malpractice, or misdemeanor; and these statutes were in force when the present constitution was framed and adopted.

The rules of the court—prepared, revised, and adopted pursuant to section 470 of the Code—provide, that *applicants* for admission to practise as attorneys and counsellors, who are *entitled to examination*, shall be examined in open court; that such examination shall be had at general term, at prescribed times, and at no other time or place, and that no private examination shall be permitted; and that to *entitle him to examination*, the applicant must prove to the court—

That he is a citizen of the United States, is twenty-one years of age, is a resident of the district in which he applies, and is of good moral character; and that every applicant must sustain a satisfactory examination upon prescribed subjects, and, if admitted, must sign a roll and subscribe and take the constitutional oath of office.

The act of 7th April last, in relation to the Law School of Columbia College, under which the present application is made, purports to constitute certain persons therein designated a committee, upon whose examination and recommendation, as evidenced by a diploma granted thereon, *any graduate of said Law School shall be admitted to practise as an attorney and counsellor at law in all the courts of this State.*

The certificate, order, and diplomas now presented, purport only that the persons therein named have been examined as in the act of April 7 provided, and on such examination, found to be duly qualified to receive the degree of Bachelor of Laws—and thereupon diplomas have been issued to them as evidence that they are entitled to that degree, and, under the act, to be admitted to practise as attorneys and counsellors.

They do not state, nor is any evidence offered to show, that the persons in the diplomas named *are citizens, or twenty-one years of age, or of good moral character*, as required by the constitution.

Or that they are residents of this judicial district, as required by the rules. Of these several facts, therefore, which are made

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prerequisites to an examination, other evidence must necessarily be given, and, we presume, can be furnished, and may be filed according to the usual practice.

As to the remaining and principal question arising on the present application, it has been decided, at the present general term of this court, in the matter of the application for admission of the graduates of the Law Department of the University in this city to practise, &c., that the Legislature has no power, under the constitution of this State, to make a diploma, conferred by a law university, sufficient evidence that the applicant for admission has the proper qualifications of learning and ability to entitle him to a license; in other words, it has been held by this court, that the right and duty to examine, inquire, and determine whether or not an applicant for admission to practise, as an attorney and counsellor of this court, is qualified for and entitled to such admission, is, by the constitution, vested in the court; that the Legislature cannot take that right from the court, and that the court, however willing to be relieved from the performance of the duty imposed, cannot decline it.

In relation to this question, the act of the Legislature now before us does not materially differ from the act relative to the Law Schools of the University, and the principle of the decision made in that matter applies to and must determine the present application; and, however good cause the court may have to believe that the persons in whose behalf this application is made have been thoroughly examined, as certified by the papers presented, and found to possess the requisite qualifications to entitle them to admission to practise, the present application must be denied, for the reason *that the requisite legal evidence* that they possess such qualifications is not before us.

RICE *a.* O'CONNOR.

Supreme Court, Sixth District; General Term, May, 1860.

PLEADING.—COUNTER-CLAIM.

Plaintiff cannot demur to a defence consisting of denials merely. He can demur only when the *new matter* in the answer, upon its face, does not constitute a counter-claim or defence.

A defence which is inartificially drawn, and commingles denials and new matter, is not, for that reason, to be held bad on demurrer, if, by a liberal construction, its allegations constitute a defence.

A counter-claim must exist in favor of defendant, and against the plaintiff, *at the time* the action was commenced, and an answer alleging that plaintiff *is* indebted, &c., and that the sum claimed *is now* due, &c., is bad on demurrer.

Appeal from an order sustaining demurrers to an answer.

The complaint contained two causes of action. The first was, that the plaintiff, at defendants' request, performed work and labor for them, and boarded their servants and hands; that afterwards the plaintiff and defendants accounted together, and upon such accounting there was found due and owing for such work, labor, and board, from defendants to plaintiff, over and above all accounts, payments, and off-sets of defendants, the sum of \$61.87, which defendants promised to pay to plaintiff; that defendants, though often requested, &c., had not paid the same. The second cause of action was, that after the accounting mentioned in the first count of the complaint, plaintiff performed work and labor for defendants, and at their request, of the value of \$13.50, and that defendants owed plaintiff a balance therefor of \$8.50, over and above payments, set-offs, &c. The complaint contained a demand of judgment for the sum of \$70.30, with interest thereon from the 15th day of February, 1855.

The answer purported to contain two defences; it was as follows: "*First Defence.*—The defendants in this action for amended answer to the plaintiff's complaint, say, that they deny each and every allegation in said complaint, except what is hereinafter admitted. Defendants further say, that it is true that

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said plaintiff did, at the special instance and request of defendants, enter into the service of the defendants, to board their servants and hands in their employ, at the time and place mentioned in said complaint, and that they did account with said plaintiff, at the time and place mentioned in said complaint; but said defendants deny that on said accounting there was found due said plaintiff the sum of \$61.87, but that there was a small amount due, which the said defendants, before the commencement of this action, paid to said plaintiff; and said defendants deny that they are indebted to said plaintiff in the sum of \$70.30, or any other sum. *Second Defence.*—And the said defendants, for another and further answer to the complaint, say, that said plaintiff is indebted to said defendants for money paid, laid out, and expended to and for the use of said plaintiff, at her special instance and request, and for goods sold and delivered to said plaintiff, and others at her request, in the sum of seven dollars and fifty cents over and above all demands and claims which said plaintiff had against the defendants at the commencement of this suit, and that the said sum of \$7.50 is now due and owing to said defendants from said plaintiff, and for which they demand judgment, besides the costs of this action.”

The plaintiff demurred to each defence separately, and assigned several grounds of demurrer to each defence. The demurrers were sustained at the special term, and judgment was rendered in favor of the plaintiff for the amount demanded in the complaint, with costs. The defendants appealed from the judgment to the general term.

Molloy & Gray, for the appellants.

Thomas Barlow, for the respondent.

BY THE COURT.*—BALCOM, J.—Section 153 of the Code contains this language: “The plaintiff may, in all cases, demur to an answer containing new matter, where upon its face it does not constitute a counter-claim or defence; and the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims.” The Code does not au-

* Present, MASON, BALCOM, CAMPBELL, and PARKER, JJ.

thorize the plaintiff to demur to a defence consisting of denials merely, and he cannot demur for any cause not specified in the Code. (See *Code*, § 140.) The plaintiff can demur *only* when the *new matter* in the answer, upon its face, "does not constitute a counter-claim or defence."

The first defence consists partly of denials, and partly of new matter. It is very inartificially drawn, and the defendants might have been required to separate the denials from the new matter (*Code*, § 150, last paragraph; rule 19, adopted in August, 1858), and make some parts of this defence more definite and certain, if the plaintiff had made a motion for that purpose. (*Code*, § 160.) But, by construing its allegations liberally, as the Code requires (§ 159), I am of the opinion such allegations constitute a defence to the first cause of action set out in the complaint. This defence is that, on the accounting mentioned in such cause of action, a sum less than \$61.87, was found due the plaintiff from the defendants, which the defendants paid to the plaintiff before the commencement of this action; and that the sum of \$61.87 was not found due from the defendants to the plaintiff. These facts constitute a complete defence to the first cause of action contained in the complaint.

The new matter in the second defence was intended for a counter-claim; but I am of the opinion it does not constitute such a claim. A counter-claim must exist in favor of the defendant, and against the plaintiff, *at the time the action is commenced*. Under our former system of pleadings, a plea or notice of set-off always stated, "that before and at the time of the commencement of this suit, the plaintiff was, and still is, indebted to the defendant," &c. The second defence in this action does not show that the \$7.50 therein mentioned was due or owing from the plaintiff to the defendant *before or at the time* the action was commenced. It commences with the allegation, "that said plaintiff *is* indebted to said defendants," and concludes with the words, "and that the said sum of \$7.50 is *now* due and owing to said defendants from said plaintiff." The defendants should have alleged that the \$7.50 was due or owing to them from the plaintiff before and at the time of the commencement of the action. Not having alleged this, the demurrer to the second defence was properly sustained.

As the plaintiff had judgment on both demurrers, it must be

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reversed, and I think the plaintiff should have leave to withdraw her demurrer to the first defence, and that the defendants should have leave to amend their answer; and that the costs occasioned by the demurrers and this appeal, should abide the event of the action. (*Code*, § 306, Sub. 2.)

Decision accordingly.

NORTHROP *a.* BURROWS.

Supreme Court, Sixth District; General Term, May, 1860.

NUISANCE.—CAUSE OF ACTION.

What obstruction of a highway is a nuisance.

Though a person is liable for unnecessary injury done by him in abating a nuisance, the kind of property constituting the nuisance, and the attending circumstances, must be considered in determining if unnecessary injury has been done.

Appeal from a judgment of a county court.

This action was brought in a justice's court to recover the value of a quantity of wood which belonged to the plaintiff, and was left by him within the bounds of the Deposit and Cannonsville Plank-road, in the town of Tompkins, in the county of Delaware. The defendant removed the wood out of the road, down a bank, and some of it fell into the Delaware river. He was a director of the plank-road company, and it was his duty, so far as the company was concerned, to remove obstructions from the road; and he was overseer of highways in the district where the wood lay. He was directed by the president and secretary of the company to remove the wood in question from the road. The wood lay in the road a week or two, and complaint in regard to it was made to the officers of the plank-road company, and then the plaintiff was informed he must take it away, but he did not do so; and it was not until about ten days thereafter that the defendant removed it. The road where the wood

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lay was on a side-hill by the Delaware river, and some fifty or sixty feet above the river. The wood lay on the upper side of the road. Some of the witnesses thought two teams could pass by it safely in the road; but most of them were of the opinion it was unsafe for teams to attempt to pass each other by the wood. Horses were afraid of it, and often shyed when they passed it. It was not shown for what reason the plaintiff left the wood where it lay. The bank was high and steep on the upper side of the road above the wood; and the defendant put the wood out of the road in the only place he could, without great inconvenience, unless he had drawn it up or down the road some sixty or seventy rods. The justice rendered a judgment against the defendant for \$1.87 damages, and \$4.12 costs. The Delaware county court affirmed the judgment, for the reason that the county judge thought he was not at liberty to disturb the finding of the justice on the evidence. The defendant appealed from the judgment of the county court to this court.

M. R. Wheeler, for the appellant.

Palmer & Root, for the respondent.

BY THE COURT.*—BALCOM, J.—On the supposition that the plaintiff left the wood in the road by reason of the breaking down of his wagon, on which he was drawing it, he should have removed it without unnecessary delay; and as no witness pretended it did not obstruct the road to some extent, it became a nuisance, if it lay there an unreasonable time. (See 9 *Wend.*, 584; Rex *v.* Jones, 3 *Campb.*, 230.) A man may throw wood into a highway for the purpose of having it carried to his house, but unless he remove it with promptness, he may be indicted for a nuisance. (See 1 *Sergt. & R.*, 220; 1 *Den.*, 524.) If the wood in question was left in the road for the reason I have mentioned, the plaintiff let it remain there an unreasonable time, and the defendant had the right to remove it as a nuisance.

The only other question in the case is, whether the defendant was guilty of unnecessarily or wantonly destroying the wood.

* Present, MASON, BALCOM, CAMPBELL, and PARKER, JJ.

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As a general rule, a person is liable for committing a wanton or unnecessary injury, even in abating a nuisance. The kind of property constituting the nuisance, and the attending circumstances, must be considered in determining whether a wanton or unnecessary injury has been committed in removing it. (See 14 *Wend.*, 131.) The defendant was not bound to handle the wood in question with that care, or deposit it in such a place, as he would household furniture. The plaintiff did not regard the wood as of sufficient value to remove it himself, although he had notice to do so; and it would be unjust to hold that the defendant should have carried it sixty or seventy rods in order to save it for him. In *Lodie v. Arnold* (2 *Salkeld*, 458), which was an action of trespass for pulling down a house made of bricks and other materials, and throwing the same into the sea, the defendant pleaded it was a nuisance, being a house built across the way, and that he pulled down the walls, &c., and they rolled into the sea. The plaintiff demurred, and judgment was given for the defendant. The court said, among other things, "that when A. has a right to abate a public nuisance, he is not bound to do it orderly, and with as little hurt in abating it as can be; and, therefore, was not answerable in this case for the rolling into the sea." Blackstone says, a "nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it." (3 *Blackst. Com.*, 5; see 9 *Wend.*, 594 and 595.) Applying this law to the evidence in this case, the conclusion is unavoidable that the defendant was not guilty of unnecessarily or wantonly destroying the plaintiff's wood. It follows that the judgment of the county court and that of the justice should be reversed, with costs.

Decision accordingly.

Casey v. Brabason.

CASEY v. BRABASON.

Supreme Court, Sixth District ; Special Term, April, 1860.

PRINCIPAL AND SURETY.—STATUTE OF FRAUDS.

One who signs a note as if he were a principal maker, is liable upon it, although in fact he was a mere surety, and the note expresses no consideration.

As respects one who *signs as principal*, the note is not a special promise to answer for the debt of another, within the statute of frauds.

Motion for a new trial.

This action was brought upon a promissory note, in the words and figures following, to wit:

“\$200. On or before two years, we jointly and severally promise to pay to Michael Casey, or his order, the sum of two hundred dollars. Given under our hands,

“JANUARY 8, 1856.

(Signed) “BERNARD McCABE,
“Catholic Pastor.
“CHARLES J. BRABASON.”

The defendant alleged in his answer that he signed the note as surety, and without consideration.

The proof showed that the note was given for a debt of McCabe's, and that the defendant signed it as his surety, without receiving any consideration therefor.

The defendant insisted that he was not liable, but the judge held otherwise, and directed the jury to find for the plaintiff; to which decision and direction the defendant excepted. The jury rendered a verdict in favor of the plaintiff for \$229.10.

The action was tried at the Chenango circuit in February, 1860.

Defendant moved for a new trial on a case and exceptions.

The other points in the case need not be stated, as they were not deemed of sufficient importance for examination.

Wm. H. Hyde, for plaintiff.

Horace Packer, for defendant.

BALCOM, J.—The instrument in question is a valid promissory note, although it does not contain the words *for value received*, or any words tantamount to them. (*Edwards on Bills and Promissory Notes*, 56, 78; 1 *Cow.*, 2d ed., 163.)

The defendant's counsel does not deny but that McCabe was liable on the note; but he contends that the defendant is not liable on it, because he signed it as surety, and did not receive any consideration therefor. He insists that the statute of frauds applies to the case, and exempts the defendant from the payment of the note. The statute is, that "every special promise to answer for the debt, default, or miscarriage of another," shall be void, unless the agreement containing such promise, or some note or memorandum thereof expressing the consideration, be in writing, and subscribed by the party to be charged therewith. (2 *Rev. Stat.*, 135, § 2.)

McCabe owed the plaintiff the money mentioned in the note; and the defendant, though in fact a mere surety, signed the note *as principal*, with McCabe. The note, therefore, was not a special promise by the defendant to answer for the debt, default, or miscarriage of McCabe.

I think the debt, for which the note was given, a sufficient consideration to uphold the note against the defendant as well as McCabe. The note, on its face, is an original undertaking of both of them.

If the defendant had indorsed the note for the accommodation of McCabe, instead of signing it as maker, he would clearly have been liable on it, if it had been duly protested for non-payment; and I am unable to see why he is not liable on it as maker.

I am of the opinion that the statute of frauds does not apply to the case; and that the jury were properly directed to find a verdict in favor of the plaintiff for the amount of the note.

The point that the defendant supposed he was only signing his name to the note as a witness when he wrote it, is untenable; for his answer concedes he signed it as surety.

I think there was no question for the jury upon the evidence; and that the defendant's motion for a new trial should be denied, with \$10 costs.

FREEMAN v. FRANK.

Supreme Court, Sixth District; Special Term, February, 1860.

CIVIL DEATH.—ABATEMENT.—DEMURRER TO ANSWER.

Though civil death abates an action for personal tort, an answer setting up that defendant is civilly dead, is inconsistent; for the fact that defendant has put in the answer proves that he is alive; the answer, therefore, is bad on demurrer.*

When the allegations of an answer are contradictory, a demurrer only admits those allegations which the law adjudges to be true. A demurrer to an answer that defendant is civilly dead, does not admit the death; for civil death is a fiction which is contradicted by the very fact that defendant has answered.

Demurrer to second defence in the answer.

The complaint stated that on the 7th day of September, 1859, at Lenox, in the county of Madison, the defendant assaulted, and beat, and wrongfully and falsely imprisoned the plaintiff, and feloniously ravished her. Judgment was demanded for ten thousand dollars damages, besides costs.

The second defence in the answer was as follows: "And for a further answer to said complaint, defendant, by his said attorneys, shows, that at the Court of Oyer and Terminer, held in and for the county of Madison, in the month of September, 1859, and after the summons in this action was served on defendant, said defendant was duly indicted by the grand jury of said county, then and there in session, for the crime of rape; that he was duly arraigned on said indictment before said court, and pleaded not guilty; that he was duly tried at said court on said indictment by a jury, and duly convicted by said jury, of the crime charged in said indictment; that on said conviction he was duly sentenced by said court to confinement and hard labor in the state-prison at Auburn for and during his natural life;

* As to what imprisonment abates an action, see 2 *Rev. Stat.*, 701, § 19; *Graham v. Adams*, 2 *Johns. Cas.*, 408; *O'Brien v. Hagan*, 1 *Duer*, 664.

that the record of said conviction was duly made out; and defendant prays leave to refer to and put the same in evidence in the trial of this action; and said defendant was duly taken to said State-prison by the sheriff of said county; that the defendant has since then been and still is confined in state-prison by virtue of said sentence and conviction. Wherefore, said defendant, by his attorneys aforesaid, avers that he is civilly dead, and that this action has abated, and the aforesaid facts will be proved on the trial of this cause as a bar to this action."

The demurrer was as follows: "The plaintiff demurs to the defendant's second answer or defence in this action for the insufficiency thereof: because said second answer or defence, upon its face, does not constitute a defence to the action; also because said second answer or defence is immaterial, and the whole is entirely unavailing."

B. F. Chapman, for the plaintiff.

Goodwin & Mitchell, for the defendant.

BALCOM, J.—The only authority for demurring to answers is contained in section 153 of the Code, and that is in these words: "The plaintiff may, in all cases, demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defence; and the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims."

The Revised Statutes contain this section: "A person sentenced to imprisonment in a state-prison for life, shall thereafter be deemed civilly dead." (2 *Rev. Stat.*, 701, § 20.) If the defendant was sentenced to the state-prison at Auburn for life, as alleged in the answer, there can be no doubt but that such sentence abated the action. For causes of action for assault and battery and false imprisonment do not survive, they die with the person. (*Gr. Pr.*, 2d ed., 93.)

When the cause of action does not survive, no step can be taken in the action after the plaintiff or defendant dies. If the living party thereafter proceeds in it, the executor or administrator of the deceased party can have the proceedings set aside on motion.

The rights and liabilities of a person civilly dead are as en-

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firely gone as though he were actually dead; and his estate may be administered upon in like manner as if his body were a corpse. A deceased person, whether he died a civil or natural death, cannot have an attorney. His executor or administrator represents him, and no other person can act or speak for him.

Does the new matter in the answer, demurred to, upon its face, constitute a defence to the action? The fact that the defendant has answered, though by attorney, shows he is neither civilly nor physically dead. It is conclusive that he is living, and not under any disability that prevents him defending the action. The defendant, by answering, proves he is alive; and when he avers in his answer that he is dead, he is not to be believed. The answer, therefore, contains two contradictory averments, one of which in judgment of law is a fiction. If the defendant was dead, he could not answer. Hence the averment that he is civilly dead must be deemed untrue. The demurrer only admits the allegations in the answer, *when contradictory*, which the law adjudges to be true. For this reason the demurrer does not admit that the defendant is civilly dead. It only admits he is living. The new matter in the answer, therefore, upon its face, does not constitute a defence to the action. The demurrer should be sustained; and the plaintiff is entitled to judgment thereon, with costs. But the defendant may answer over within twenty days, on payment of costs.

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Supreme Court, First District; At Chambers, March, 1860.

Again, Special Term, May, 1860.

AMENDMENT.—POWER OF REFEREE AT THE TRIAL.

The power of a referee to allow amendments is restricted to amendments to cure immaterial variances.

A referee cannot allow a cause of action to be inserted in the complaint by way of amendment.

*modified; 11/2/60
H2; 19 Nov 1867.*

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In an action brought by a corporation claiming to have been incorporated in 1852, under a general law, it appeared on the trial that a part of the indebtedness sued on accrued to a corporation of the same name as plaintiffs, before that date; that such corporation was originally formed by special charter, and that on the expiration of that charter, in 1852, the present corporation was organized under the general law, and the portion of the indebtedness in question was passed to it, with other assets, by assignment.

Held, 1. That the variance could not be amended by a referee.

2. That the court had power to amend it upon terms.

Of the proper terms to be imposed on such amendment.

I. *March*, 1860.—Motion to vacate an order made by a referee allowing an amendment of the complaint.

This action was commenced in March, 1859; the complaint charged the defendants with an indebtedness of \$141,586, for moneys fraudulently obtained from plaintiff between the first day of January, 1849, and the 16th day of March, 1858, by means of overdrafts and false entries in the books of account of the plaintiff, in collusion and with the aid of a book-keeper in the employ of the plaintiff during that time.

A judgment was obtained by default against the defendant, Garrett S. Mott; the default was afterwards opened on terms, but the judgment ordered to stand as security. Both defendants, by separate answers, denied the complaint, and set up the statute of limitations. After answer, the defendants were arrested and held to bail in the sum of \$142,000.

The cause was by consent referred, and, on the hearing before the referee, the evidence given covered the whole period stated in the complaint, from which it appeared that the plaintiff was an institution organized under the general banking law, in December, 1852, and commenced business January 1, 1853; that the institution known as the Union Bank, existing before the last date, was chartered in 1811 by the name of "The President, Directors, and Company of the Union Bank of the city of New York," and that the said charter expired, and said bank ceased to exist, on the last day of December, 1852; that all the claims against the defendants but \$1000 occurred previous to 1852, and were held by the plaintiff as assignee.

Upon the close of the proof, it was insisted that, under the complaint, the plaintiff was not entitled to recover for any claim

accruing prior to 1853. The plaintiff claimed that the referee should conform the pleadings to the facts proved, but he declined.

The plaintiff then moved before the referee for leave to amend the complaint, by inserting another count for the claim accruing prior to 1853, as assignee. This motion the referee granted. The defendants obtained an order for the plaintiffs to show cause why this order of the referee should not be vacated.

S. A. Foote, for the plaintiffs.

David Dudley Field, for the defendant Garrett S. Mott.

C. Ga Nun, for the defendant Jacob H. Mott.

ALLEN, J.—By section 272 of the Code of Procedure, referees have the same power to allow amendments to any pleadings as the court upon such trial. Mistakes in pleading and amendments are regulated and provided for in chapter 6 of the 2d part of the Code; sections 169–173, inclusive, are more particularly applicable here. Section 169 declares that no variance between the allegation of a pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits, and governs referees as well as courts whenever questions of variance arise.

Section 170 authorizes the court, when the variance is not material, to direct the fact to be found according to the evidence, or to order an immediate amendment, without costs.

This is the only provision I find in the Code authorizing an amendment of the pleadings by the court upon trial, and this is to remedy an immaterial variance; and my opinion is, that the discretion and power of the referee in regard to amendments are restricted to cases within this provision, and that it was not the intent of the Legislature to confer upon referees power to do what the court may do upon or after judgment in furtherance of justice, under section 173.

The issues of fact, already joined, are sent to referees for trial, and, *non constat*, that the parties would have consented, or the court have ordered a reference of other and different issues; and

hence, while it was proper and convenient that immaterial variances, which the referee was bound to disregard, should be obviated by immediate amendment, there was no necessity of giving to the referee all power and discretion over the pleadings in the action.

He should have every facility for trying upon the merits the issues substantially joined by the parties.

By section 272, therefore, the power of the referee is defined and limited by reference to the power of the court in like cases upon the trial, and that power is conferred by section 170.

This was not the case of a variance between the pleadings and proof, but, as was properly decided by the referee, the case of an entire omission of the principal cause of action; the plaintiff's claim consisting of two distinct causes or demands,—the one originating in dealings of the defendants with the plaintiff, and the other in similar dealings of the defendants with a third party to whose rights and claims the plaintiff has succeeded.

Under the complaint the plaintiff was not entitled to recover for the latter claim, as the referee correctly decided; and an amendment was necessary by adding a second count, and this was allowed by the referee.

This order was not warranted by the Code, and must be set aside, and the referee restricted to the trial of the issues referred.

If it be conceded that the referee may exercise the powers conferred upon the court by section 173, still the order for this amendment is not warranted by it, so far as applicable to this case; that section permits the court "before or after judgment, in furtherance of justice, and on such terms as may be proper, to amend any pleading," by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.

The allegations proposed to be inserted in the complaint were not "material to the case,"—that is, the case made, or attempted to be made, by the original complaint,—but were necessary to make a new and distinct case. The amendment was not, therefore, within that clause of the section, and was for-

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bidden under the other, as it confessedly within the ruling of the referee, and clearly, upon every principle, did change substantially the claim of the plaintiff.

It was not a case for conforming the pleading to the facts proved.

Amendments upon trials should be cautiously made, and care should be taken that the interests of the other parties are not jeopardized by them, and I do not think an amendment of this character, without terms or conditions, was discreet, if the power to authorize it be conceded; but as the exercise of a discretion vested in the referee, it would not be the subject of review except it were grossly abused, and this could not be predicated of any act of the learned referee here, and I rest my decision solely on the ground of a want of power of the referee.

I presume this is a very proper case for the court to interfere, and allow the amendment asked, upon such terms and conditions as shall seem to be proper; and what those terms and conditions shall be, can only be determined after a case shall be made requiring or justifying an amendment, and the parties shall be heard.

The order must be set aside without costs, and the plaintiff must have leave to apply by motion to this court to amend the complaint, and the proceedings on the reference may be stayed to allow the motion to be heard.

II. *May*, 1860.—Motion for leave to amend the complaint.

In pursuance of the leave reserved in the order vacating the referee's order allowing the amendment, the plaintiff subsequently moved at special term for leave to amend.

JAMES, J.—The only questions properly before me for consideration, are, whether the amendment asked for should be allowed, and if so, upon what terms and conditions. As I understand the Code, it was intended to give a party every facility of amendment consistent with a proper regard for the rights of the other party to the action. It conferred upon parties or the court the power of amendment in every stage of the action. Section 172 provides for amendments, of course, before trial; sections 169 and 170 provide for amendments by the court dur-

ing the trial; which power is also conferred upon referees by section 272; and section 173 confers upon the court at any stage of the action, in furtherance of justice, and on such terms as may be proper, the power to allow an amendment of any pleading, process, or proceeding, by adding or striking out the name of any party, by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.

The amendment asked in this case is to insert other allegations material to the case. The case, as stated in the original complaint, is to recover for money fraudulently obtained from the plaintiff, between January, 1849, and March, 1853. It appears that the plaintiff is a corporation, created in December, 1852, which succeeded to all the property, rights, &c., of another institution, of nearly the same name, the charter of which expired on the last day of December, 1852, the plaintiff continuing the same business, in the same place, with the same clerks, &c., as the old bank. All the indebtedness accruing before 1853 was to the old bank instead of to the new, and belongs to the plaintiff by assignment; hence the amendment proposed is necessary to show plaintiff's title to that part of the demand. It comes clearly within both the letter and spirit of section 173 of the Code. Of the power of the court to grant such amendment, I have no doubt.

Whether the claim, alleged to be due from the defendant to the above bank, and assigned, is capable of assignment, it is not now necessary to decide—the full facts upon that point were not presented for my consideration. For the purposes of this motion I assume that it was, and, therefore, the claims held as assignee, and those due to plaintiff in its own right, could be joined in one action, and it would, therefore, be in the furtherance of justice to allow this amendment to be made, rather than turn the plaintiff over to another action.

The defendants insist that if the motion is granted, it should be only on condition that the judgment, obtained by default, and the order of reference, be vacated, the bail given on the arrest discharged, and the defendant permitted to demur to or answer anew the amended complaint, and that plaintiff pay all costs

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accruing since the service of the original complaint, with costs of this motion.

I do not understand that allowing this amendment enlarges the judgment obtained by default, or extends it as a security for any matter which could not be recovered under the complaint upon which this judgment was entered. Such judgment can only stand as security for such subsequent judgment as may be obtained for the consideration stated in the original complaint. To that extent, I can see no impropriety or injustice in allowing it to stand.

The bail in this case is very large, and the amount recoverable under the original complaint comparatively small. To continue the bail at its present amount, would be oppressive and unjust. Upon the fact, as presented on this motion, it is doubtful if an order of arrest would have been granted. I shall, therefore, direct the undertaking and the bail to be discharged, but without prejudice to any new application for an order of arrest, under the amended complaint.

I can see no reason for vacating the order of reference. Twenty-two days have already been spent in taking testimony, all of which is applicable to the case, if amended, and will have to be gone over again, if the order of reference be discharged. In fact, the whole trial, as far as it has proceeded, was upon the same questions as will arise under the amended complaint; and as no objection is made to the referee, the order should stand, and the testimony already taken made applicable to the pleadings as amended.

It was not made to appear why or wherein a demurrer or a new answer would be essential to protect the rights of the defendants, in case the motion to amend was granted. The original complaint, and the amendment proposed being presented, the court can see that no demurrer would lie, unless upon the ground that the complaint did not state facts sufficient to constitute a cause of action; and that question can be raised as well upon the trial as by demurrer. (*Code*, § 148.) And in the absence of cause, the answers already in, as they put the plaintiff to the proof of the whole case, and interpose the statutory bar, may be extended to the amended complaint without injustice to the defendant.

Upon such amendment being made, the parties will be pre-

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pared to proceed in the trial of the cause before the referee, at the place where they left off before this motion was made.

The motion to amend is granted, upon the foregoing terms and conditions, and on plaintiff's paying to the attorneys of each party \$10 costs of this motion.

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New York Common Pleas; General Term, May, 1860.

ABATEMENT.—CONTINUANCE.

Upon the death of a defendant, it is not absolutely necessary that the application for a continuance be made within a year ; but the court may order a continuance, if within the year, upon a simple motion,—if after the year has elapsed, then on a supplemental complaint.*

* Section 121 of the Code provides that no action is to abate by death, &c., of a party, or by transfer of interest, if the cause of action survive. In case of death, &c., the court, on motion, within one year, or afterwards on supplemental complaint, may allow the action to be continued against the representative or successor in interest. In case of other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the transferee to be substituted.

This section was enacted in 1848, except the clause, "or afterwards on supplemental complaint," which was inserted in 1849.

The following are the cases on this subject under the Code :

1. *In what case a continuance will be ordered.*

On a motion for leave to continue, if the *pleadings* show a cause of action which survives, the court will not hear *affidavits* to show the contrary,—*e. g.*, that the plaintiff had assigned the claim before the commencement of the suit. (Wing *a.* Ketcham, 3 *How. Pr. R.*, 385 ; S. C., 2 *Code R.*, 7.)

An action brought against a sole defendant to recover the possession of land, may, after the death of the defendant intestate, be continued against his heirs at law, claiming to have succeeded to his legal rights and to own the land. And it is not necessary that the heirs should be shown to be in possession of the premises in suit. (*Supreme Ct.*, III. *Dist.*, *Sp. T.*, 1850, *Waldorph a. Bortle*, 4 *How. Pr. R.*, 358.)

The death of a sole defendant in an action for the recovery of possession of land, abates the action ; which cannot be continued against his representatives, on application of the plaintiff, by order under section 121 of the Code. The

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Appeal from an order of the special term granting leave to continue an action.

BY THE COURT.—BRADY, J.—This action is in form an action at law. It is brought to recover damages for the breach of a

cause of action in such a suit involves two ideas,—the right of the plaintiff to the land claimed, and the occupancy thereof or claim of ownership therein by defendant. The right of the plaintiff continues notwithstanding defendant's death, but the occupancy or ownership of defendant does not. The cause of action therefore does not continue ; but a new cause of action arises against the new occupant of the premises. (*Supreme Ct., IV. Dist., Gen. T., 1852, Putnam a. Van Buren, 7 How. Pr. R., 31* ; approved and followed in *Moseley a. The Albany Northern Railroad Company, 14 Ib., 71.*)

Where a defendant in an action for lands transfers his possession *pendente lite* to a third person, the suit may be continued against the original defendant without notice to the grantee ; and upon the judgment and writ of possession, such grantee may be dispossessed. Such an action, founded in tort—*e. g.*, for an entry into the lands of another, and unlawfully withholding possession from him, or for trespass in cutting timber by a tenant at will, or for years, or for waste, committed by a tenant for life or for years—is personal to the tortfeasor ; it dies with his person, and cannot at common law be continued against his grantee. Such a cause of action cannot be deemed to “survive or continue” against the grantee, and a motion to make such a grantee a party defendant should be denied. His assuming and withholding possession constitutes a new cause of action against him. (*Mosely a. The Northern Railroad Company, 14 How. Pr. R., 71.*)

In an action for slander, after verdict and judgment for plaintiff, and pending an appeal, if the defendant dies, a motion to continue the action in the name of his personal representatives is not necessary, so far as the pending appeal is concerned. But the representatives may wish to appeal from the decision at the general term ; and to do this, they must first become parties to the action ; and it is more *orderly* for such parties, before appealing, to have an order under section 121, allowing the action to be continued in their name. (*Miller a. Gunn, 7 How. Pr. R., 159.*)

Where, in an action against a non-resident defendant, the summons is served by publication under an order of the judge, the suit is not commenced until the expiration of the time prescribed for publication ; so that if the defendant die before the expiration of such time, no action is pending that can be revived against his representatives. (*McEwen a. Public Administrator, 3 Code R., 139* ; *S. P. approved, Moore a. Thayer, 10 Barb., 258.*)

The Code of Procedure provides (§ 139), that from the time of the allowance of a provisional remedy in a civil action, the court shall be deemed to have acquired jurisdiction and to have control of all subsequent proceedings. And though the time for service by publication has not expired, the granting an order of attachment gives the court sufficient jurisdiction, the defendant having died since the order was made, to substitute the personal representative of the deceased in his place as a party defendant. (*Moore a. Thayer, 10 Barb., 258* ; *S. C., 6 How. Pr. R., 47* ; *3 Code R., 176.*)

In an action against maker and indorser, the plaintiffs (a bank) entered judg-

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contract made between the parties. The defendant died pending the suit, and before verdict or interlocutory judgment. Prior to the Code the action would have abated upon the death of the defendant, and it could not be continued against his per-

ment against the maker, before the indorser was served. A receiver of plaintiff's was subsequently appointed; after which the indorser was served with the summons. A motion was then made to substitute the receiver as plaintiff, instead of the bank. *Held*, that the motion could not be granted. At the time of the appointment of the receiver, there was no action pending, judgment having been perfected against the maker, and the indorser having then not been served. (*East River Bank v. Cutting*, 1 *Bosw.*, 637.)

2. *Mode of obtaining continuance.*

Under section 121 of the Code, the court has no discretion to continue an action upon motion after the year has elapsed. After that time, the continuance must be by supplemental complaint. (7 *How. Pr. R.*, 296; *Coon v. Knapp*, 13 *How. Pr. R.*, 175; and see *Johnson v. Williams*, 2 *Abbotts' Pr. R.*, 229.)

Leave of the court to continue an action under section 121 of the Code, is equally necessary whether the continuance is sought before or after the expiration of the year. (*Johnson v. Williams*, 2 *Abbotts' Pr. R.*, 229.)

The Code of Procedure being silent as to the practice to be pursued when the representative of a deceased party applies on a supplemental complaint for the continuance of the action, the former practice in chancery must be regarded as furnishing the mode of proceeding. And where the plaintiff is dead, the defendant cannot move to dismiss for want of prosecution. (1 *Barb. Ch. Pr.*, 244.) The proper practice is to grant an order that the representatives of plaintiff file a supplemental complaint in a stated time, or that the complaint be dismissed. (18 *Ves.*, 424; 4 *Mod.*, 171; 5 *Ib.*, 80; 1 *Hopk.*, 450; *Whitt. Pr. R.*, 298, 300; *Greene v. Bates*, 7 *How. Pr. R.*, 296; compare *Harrington v. Becker*, 2 *Barb.*, 75; *Williamson v. Moore*, 5 *Sandf.*, 647.)

The representatives of a deceased plaintiff have not a right of election whether the suit shall be continued or be dismissed. Section 121 of the Code of Procedure, like the provisions of 2 Revised Statutes, 184,—relative to the abatement of suits in equity,—gives to defendant, in general, a right to have the suit continued in the name of the representative. (4 *How. Pr. R.*, 358; *Ridgeway v. Bulkeley*, 7 *Ib.*, 269.) But it seems, that upon the death of a sole defendant in an action to recover possession of lands, if defendant's heirs be infants and out of possession, they cannot be substituted on the mere motion of the plaintiff, and without their having opportunity to elect either to be made parties or to abandon. (*Putnam v. Van Buren*, 7 *How. Pr. R.*, 31.)

Representatives of a sole defendant deceased, cannot, under section 121, compel the plaintiff to continue the action against his will. (*Keene v. La Farge*, 1 *Bosw.*, 671; and see *Chapman v. Foster*, 15 *How. Pr. R.*, 241; *Souillard v. Dias*, 9 *Paige*, 393; *Hopkins v. Adams*, 5 *Abbotts' Pr. R.*, 351.)

But in order to set the plaintiff in motion, the representatives of a deceased defendant may have an order that the complaint be dismissed with costs, unless the plaintiff, within a specified time, obtain leave, and file a supplemental complaint, and bring in such representatives. (*Chapman v. Foster*, 15 *How. Pr. R.*, 241.)

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sonal representatives. (2 *Rev. Stat.*, 386; *Keene a. Lafarge*, 16 *How. Pr. R.*, 377.) If the action was one pending in equity, prior to the Code, such would not have been the rule. The court could have ordered the suit to stand revived against the representatives of the defendant, upon the petition of the complainant. No bill of revivor was necessary. (2 *Rev. Stat.*, 184, §§ 109-114; 1 *Hoffman's Ch. Pr.*, 370.) The provisions of section 121 of the Code, so far as relates to the motion within the year therein contemplated, are analogous to the rule in equity prior to the Code, at least in reference to a sole defendant. (See *Moore a. Thayer*, 10 *Barb.*, 259.) Where the motion is not made within the year, the relief desired may be had by supplemental complaint by the same section. This distinction in the mode of obtaining the relief is said to be a premium on diligence (1 *Whitt. Pr.*, 544); but I do not understand the judges to have so declared. The result of an examination of the cases adjudicating section 121 is, that the statute has limited the power of the court to permit the action to be continued on motion (*Greene a. Bates*, 7 *How. Pr. R.*, 296; *Coon a. Knapp*, 13 *Ib.*, 175; *Gordon a. Sterling* and others, *Ib.*, 405), unless made within a year after the death of the party; and if not made within that time, the continuance will only be permitted on a supplemental complaint. The office of a supplemental complaint, in a case like this, would be to state the death of the defendant, and the appointment of his personal representatives, in addition to the statement of the commencement of the action, and of the allegations in the complaint, and the proceed-

Where the cause of action is assigned pending the suit, it is discretionary with the court to permit the assignee to be substituted in the place of the original party, (*Harris a. Bennett*, 6 *How. Pr. R.*, 220; *S. C.*, 1 *Code R.*, *N. S.*, 203; *Sheldon a. Havens*, 7 *How. Pr. R.*, 268; *Murray a. General Mutual Insurance Company*, 2 *Duer*, 607; *Ford a. David*, 1 *Bow.*, 571.)

In general the substitution of the transferee of the claim in suit should not be ordered, where the object is to enable the original plaintiff to be examined as a witness. (*Harris a. Bennett*, 6 *How. Pr. R.*, 220; *Murray a. General Mutual Insurance Company*, 2 *Duer*, 607.)

He who applies to be substituted as plaintiff, on the ground of a transfer of interest to himself, must show a clear *prima-facie* case of succession to the plaintiff's title. And the court will not, on a motion of this kind, determine which of two persons is the legal successor to the title. (*Supreme Ct.*, 1854, *St. John a. Covell*, 10 *How. Pr. R.*, 253.)

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ings had in the action. The supplemental complaint of section 121, so far as it affects this case, is the bill of revivor of the late Court of Chancery. (1 *Barb. Ch. Pr.*, 679; 2 *Ib.*, 59, 68; 1 *Hoff. Ch. Pr.*, 377.) A supplemental complaint was one which sets forth facts material to the case occurring after the commencement of the action, or at least unknown to the plaintiff or complainant when the action was commenced; or to add parties, or remedy a defect in the prayer of the original bill. (1 *Hoff. Ch. Pr.*, 393; 1 *Smith's Ch. Pr.*, 525.) No new facts are necessary to the success of the plaintiff. The additional allegations are only necessary to continue an action already commenced. No new interests or rights have intervened, rendering what was called a bill of revivor and supplement, under the former system of equity practice, necessary. The action must be against the personal representatives. The personal estate must be exhausted before the heirs can be sued in respect of their shares of the real estate. (3 *Rev. Stat.*, 5th ed., 750; *Mesereau a. Ryers*, 3 *Comst.*, 261.) The omission of the plaintiff to present his claim to the representatives of the defendant, assuming that to have been necessary, which I do not believe, does not affect his right to proceed. It limits his recovery to the amount of personal property unadministered. (3 *Rev. Stat.*, 5th ed., 176, §§ 44, 45; *Baggot a. Boulger*, 3 *Duer*, 160.) Nor does the delay in proceeding with the action deprive him of his right to continue it. An application to the court by the representatives would have relieved them from the delay. (*Greene a. Bates*; *Keene a. Lafarge*, *supra*.)

I do not agree, for these reasons, to the proposition that unless the application to continue is made within a year after the abatement of the suit, the abatement becomes absolute. I think section 121 was designed to embody the practice in equity, and to abolish bills of revivor, and bills of revivor and supplement in all cases to which its provisions apply, and to allow the continuance of such cases by simple motion if made within a year, or by a supplemental complaint after the expiration of that period. Such is the view taken of it generally, as stated by Judge Hilton, in his opinion delivered at the special term. I do not think either, that this is a case in which, as a matter of discretion, we should refuse to permit the action to be continued. As already shown, the representatives of the defendants have

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been guilty of laches, and in that respect are in no better position than the plaintiffs. Whatever may be the view taken of section 121, where there has been any transfer of interest in any action, it is quite clear, to my mind, that in this case the motion to continue was properly granted, and that the order of the special term should be affirmed.

Ordered accordingly, with \$10 costs.

JOHNSON *a.* FARRELL.

Supreme Court, Second District; General Term, May, 1860.

JUDGMENT FOR COSTS.—MODE OF ENTERING.—APPEAL.

Where on a recovery of a money demand by the plaintiff, the defendant is entitled to costs, the costs should be set off against the plaintiff's recovery, and there should be but one judgment entered and execution awarded, for the excess of the one over the other, to whichever party it belongs.

When, in such a case, defendant entered a judgment for his costs, and plaintiff's application to have the judgment set aside was refused by the court—

Held, that the judgment should be reversed on appeal, and the proceedings remitted.

It seems, that the order denying the motion to set aside the judgment would be appealable.

Appeal from an order and a judgment of the City Court of Brooklyn.

The facts are stated in the opinion.

Mr. Garrison, for the appellant.

Mr. Thornton, for the respondent.

BY THE COURT.*—EMOTT, J.—The judgment which was entered in this action in the City Court was plainly irregular and improper. The plaintiff sued on a money demand; the defend-

* Present, LOTT, EMOTT, and BROWN, JJ.

ant answered payment and the statute of limitations. The case was referred, and the referee reported that there was \$47 due the plaintiff. Upon this report the defendant was entitled to costs, but the plaintiff was also entitled to the amount due him. The amount of the defendant's costs, when taxed, should have been set off in the judgment against the plaintiff's recovery, and execution awarded for the excess of the one amount over the other, to whichever party it belonged. Instead of this, the defendant proceeded to tax his costs, and to enter up a separate and complete judgment and award of execution against the plaintiff for the whole amount of them. The plaintiff applied to the court below to set aside the judgment, but was refused, and he has appealed both from the judgment and the order refusing to set it aside.

It will be remembered that this was an action between these two parties only, and in which there was not even a counterclaim, nor a demand of affirmative relief of any sort. The only issue was the existence and amount of the debt and its payment. There is nothing in the Code authorizing two judgments in such a case between the same parties, one for the plaintiff for his debt, and another for the defendant for his costs. Section 274 of the Code authorizes judgments for or against one of several plaintiffs or defendants, but not two judgments for or against one plaintiff, and for or against one defendant. The court below must have acted upon the supposition, that the plaintiff could proceed, without vacating the judgment entered by the defendant, to enter another judgment. It could not have been intended that the defendant should recover his costs absolutely and entirely, without reference to the plaintiff's recovery against him. The case is presented to us, however, as if this were the decision of the City Court, for as long as the present judgment stands, it prevents the entry of another, and instead of awarding to the defendant the excess of his costs over the amount reported due from him, it extinguishes his liability altogether, and gives him judgment for his costs in full.

The proper practice, and the only course by which the rights of the parties are protected, is that which obtained in such cases before the Code. The defendant was not entitled to make up a separate record, but to have his costs inserted in the plaintiff's record, and the excess either way awarded where it belonged,

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with execution to collect it. If the plaintiff neglected to make up the record, the defendant might have leave to do it. Even then it would not be such a record nor such a judgment as this, but the same judgment which the plaintiff would have made up had he not neglected to do so. The rule that even when there are several defendants, part of them who become entitled to costs, are not entitled to make up a separate record and judgment, will be found in many cases. (See 12 *Wend.*, 236; 4 *Hill*, 588.) If the City Court had amended this judgment by inserting the plaintiff's recovery, the whole matter would have been a question of form and practice. But by refusing to interpose, and leaving this judgment to stand as it is, the record which is sent up to us discloses manifest error. We see here a report by the referee in favor of the plaintiff entirely disregarded, and a judgment directly against it in favor of the defendant for his full-taxed costs. This we cannot avoid reversing.

What has now been said would dispose of the objection that the order refusing to set aside the judgment was not appealable. The plaintiff has appealed both from the order and the judgment, and the latter cannot be justified upon its face. But if the consequence of the proceeding in the court below were only to compel the plaintiff to enter another judgment, and issue his execution against the defendant to countervail that issued by the defendant against him, or to apply to the court to offset the two judgments between the same parties in the same cause, which would certainly be a curious procedure,—still I am of opinion that such an order could be reviewed upon appeal. The plaintiff had a strict legal right to have the adjustment and offset between the amount due to him and from him made, before any judgment passed in the cause. That was not a matter of favor or discretion, nor merely of practice. It might involve serious inconvenience, if not more, to have this denied him, and be driven to an application for a set-off of two judgments where there ought to have been but one. The order which was made denying this right may be regarded as a final determination under section 6 of the act organizing the City Court. That phrase should, in my opinion, be construed, by analogy to the sections of the Code relating to appeals to the Court of Appeals, so as to include determinations made upon applications after judgment, which involve the merits or affect substantial rights.

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The appeal from the judgment, however, would bring the question before us, and it may be unnecessary to decide whether an appeal would lie from the order alone.

The judgment and order are reversed, with costs, and the proceedings remitted to the City Court, that judgment may be entered in accordance with the rights of the parties.

 CATLIN *a.* COLE.

Supreme Court, Second District; Special Term, March, 1860.

CASE.—RESETTLEMENT.

After a cause has been heard and determined by the general term, and a statement of the facts found ordered to be annexed to the roll, and an appeal has been taken to the Court of Appeals, a resettlement of the case, and a restatement and refinding of the facts found by the referee, is not to be allowed.*

* The Court of Appeals hold that their review must be upon the same case on which the cause was heard at general term, except where by the leave of the court below, or on consent, a case containing only the questions of law is substituted; and that though the court below has power to reform the case used in that court, so that it shall present to the Court of Appeals questions of law alone, they have no power to change it by inserting facts otherwise than as found by the referee, or exceptions not taken. (*Johnson a. Whitlock*, 13 *N. Y.* (3 *Kern.*) *R.*, 344.)

Where the case is not properly settled, that court will, in a proper cause, give the appellant leave to apply below to amend the record. (*Westcott a. Thompson*, 16 *N. Y.* (2 *Smith*) *R.*, 613.)

In *Smith a. Grant* (17 *How. Pr. R.*, 381), after a trial by the court, and appeal by defendant, on a case and exceptions, to the general term, judgment was affirmed, on the appeal, on the ground that certain facts were established by the evidence, though not stated in the finding. The defendant appealed to the Court of Appeals; and in that court the cause was ordered to stand over, with leave to the appellant to apply to the court below for a resettlement of the facts found, on the ground that they were not sufficiently stated, and the application was accordingly made, and made at a general term.

Held, on such application, 1. That the court at general term could not resettle the facts found below.

2. That they could not send the cause below for a resettlement, because, having pronounced judgment on the appeal, any alteration in the facts found would make it a different case.

Catlin *v.* Cole.

It seems, however, that a specific error or omission in the case might be corrected in a proper case.

Motion to refer back the cause for a resettlement of the case and exceptions.

In this case, on an appeal to the general term, after a trial by a referee, the court ordered that the facts found by the general term be annexed to the judgment-roll. On appeal from the general term to the Court of Appeals, the appellants moved in the latter court that they have leave to apply to the Supreme Court for a resettlement of the case. The order made on this motion recited that it was the opinion of this court that if the case needs any resettlement, it should be done by and before the referee who tried the cause; and no opposition to the motion being made on the part of the respondent, it was ordered that the motion be granted—expressing, however, no opinion upon the question, whether the case, as already settled, does or does not conform to law and the practice of the court.

The appellant now moved at special term to refer back the action to the referee, before whom the same was tried, to amend and settle or resettle the case and exceptions, and to separate therefrom the exceptions stated therein, in such manner, and so as duly to present to the Court of Appeals the questions of law which ought to be examined by such court on the appeal taken by the defendants to the Court of Appeals, and to amend and resettle the findings of facts and conclusions of law of the referee, so as to fitly present the questions to be examined.

N. Dane Ellingwood and *H. Whittaker*, for the motion.

Mr. Street, opposed.

BROWN, J.—The order made by the Court of Appeals on the 6th of January, 1860, which appears to have been granted in

3. That they would permit a statement of the findings of the court at general term to be settled, and attached to the record, on terms.

See also *Mills v. Thursby* (No. 9), 11 *How. Pr. R.*, 134; (No. 11), 13 *Ib.*, 417; where such amendments were made under peculiar circumstances.

In *Fish v. Wood* (2 *Ante*, 419), the court refused to allow a resettlement of the case, on the ground that the application came too late, after the decision of the appeal.

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the absence of the respondent, does not direct that the case in this action be resettled. If it needs to be resettled, it directs it shall be done by the referee who tried the action, but expresses no opinion upon the question whether the case, as already settled by the referee, does or does not conform to the law and practice of the courts.

If rule 38 of this court, to which I am referred, applies to a case heard at the general term, and decided upon the facts and the law found by the referee, and spread out at length upon the papers, it can require no more than that the general term or the judge who delivers the opinion shall say, I determine, by the order of the court, that the general term do find the same facts as were found by the referee before whom the cause was tried, and that such facts be annexed to the judgment-roll, as the facts found by the general term. This has already been done by the order of the special term of the 19th of October, 1859.

The general term of the Supreme Court is a court of appeal, and nothing else, with power to review the judgments and decisions made by referees, as well as by the special term. The Court of Appeals entertains appeals from the judgments of the general term, upon the same state of facts as were presented to the general term, and no other. Cases will doubtless occur when some word, or exception to a decision, or to some separate proposition in a charge of the judge is accidentally omitted in the bill of exceptions, and not discovered until the action has been removed to the Court of Appeals. In all such cases it is quite right that the specific error should be corrected and the omission supplied. But I do not recognize the regularity of a practice which would authorize an entire resettlement of the case, and a restatement and refinding of the facts found by the referee, after which the cause has been heard and determined by the general term. This is the relief demanded by the defendants on this motion; and if it should be granted, the case in the Court of Appeals would not, perhaps, be at all like that which was heard at the general term.

The facts have been carefully and fully found by the referee. They occupy some twenty-three folios of the case, and are signed by the attorneys who appeared for the parties in the action. I do not see that I can do otherwise than adhere to the

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order of the special term of the 19th of October, 1859, which has not been reversed or modified.

The defendants' motion must be denied, with \$10 costs of opposing the motion.

DICKINSON *a.* BENHAM.

Supreme Court, First District; Special Term, April, 1860.

ATTACHMENT.—MOTION TO VACATE.

Where defendant moves to vacate an attachment solely on the original affidavits, plaintiff cannot offer new affidavits in resisting the motion, even to show as a preliminary objection that the defendants have parted with their interest in the property attached.

It seems, that the fact that since the attachment has been levied, the defendants have assigned their interest in the property attached, does not affect their right to move for a discharge of the attachment for insufficiency in the papers on which it was granted.

Defendants, when called upon to give security for their debt to the plaintiff, stated that if the demand were sued, they would make an assignment; and that they owed a large amount of confidential debts which they should first provide for.

Held, that this was no evidence that they were about to dispose of their property with intent to defraud creditors, and that an attachment granted solely on this fact must be vacated.

Motion to vacate an attachment granted as a provisional remedy.

C. D. Newman, for the motion.

H. Brewster, opposed.

BONNEY, J.—On the 14th January, 1860, the warrant of attachment was issued in this action, on allegations that defendants were about to dispose of their property, with intent to defraud their creditors. (*Code*, § 229.)

The defendants, on summons, affidavit, and warrant, now move to set aside the attachment, with costs, on the ground that the affidavit does not state facts sufficient to authorize it.

*affirmed
17 Feb. 158;
20 Nov. 343.64.
Attorneys 14 Feb. 64.*

The plaintiffs, as a preliminary objection to the motion, offer to show by affidavit that the defendants, on the 21st of January, 1860, made an assignment of all their property for the benefit of their creditors, giving preferences, and insist that defendants have consequently no present interest in the property attached, and, therefore, cannot make this motion. I do not think this affidavit can be received, nor, in my opinion, would this objection avail if the supposed fact appeared. The Code, section 241, gives defendants the right to move to discharge an attachment, *as in the case of other provisional remedies*, and I understand the rule to be as to all provisional remedies, that the persons against whom they are taken may remove to vacate them on the ground that the papers on which they were allowed were insufficient, and that the remedies or process were illegally or improvidently granted.

The authorities on which plaintiffs rely, at the utmost only decide that the party against whom an attachment is issued, cannot move its discharge, when he had no interest in the property attached at the time when the attachment was issued or levied,—which is not the case.

Additional affidavits are also offered by plaintiffs to sustain the attachment; to the reception of which defendants' counsel objects. I have examined the authorities cited by plaintiffs' counsel to sustain his offer, and, following the case of *Wilson v. Britton* (6 *Abbotts' Pr. R.*, 33), hold that affidavits in opposition to a motion to set aside an attachment, are to be received only to explain or contradict affidavits offered by the moving party.

In this case the motion is made on the original affidavits alone, and consequently no affidavits on the part of the plaintiffs are admissible.

The only facts, stated in the original affidavit, to sustain the allegation that defendants were about to dispose of their property, with intent to defraud their creditors, are, that, when defendants were called upon to give security for plaintiffs' demand, or part of it, they refused, "*and then stated that if the plaintiffs' demand were sued, they would make an assignment; and that they owed a large amount of confidential debts which they should first provide for.*" The law of this State allows debtors to make an assignment of their property for the benefit of their

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creditors, and to give preferences in payment; and it appears to me that this statement, fairly construed, amounts only to a declaration, that in case an action was commenced by plaintiffs, the defendants would exercise this legal right; and I cannot consider such declaration any evidence that defendants were about to dispose of their property, with intent to defraud creditors.

The case of *Wilson a. Britton* (6 *Abbotts' Pr. R.*, 97) is direct authority for this decision.

The motion is granted, with ten dollars costs.

McKEE *a.* TYSON.

Supreme Court, Second District; Special Term, April, 1860.

JUDGMENT BY CONFESSION.—AMENDMENT.

A judgment by confession founded on a defective statement, cannot be amended so as to sustain its priority over intervening judgment-creditors.*

* It has been doubted whether the court have power to compel an amendment of a statement for a judgment by confession. (*Hammond a. Bush*, 8 *Abbotts' Pr. R.*, 152.) It seems, however, to be generally agreed that this may be done, but not, however, to the prejudice of intervening judgment-creditors. The following are the cases in this State, illustrating this question of amendment:

In *Seaman a. Drake* (1 *Chi.*, 9), the clerk's omission to sign a judgment, filed and docketed, was considered a mere clerical omission, and the court permitted his signature to be added *nunc pro tunc*.

Where plaintiff's judgment was docketed, but by neglect of the attorney the defendant's plea was not signed, nor the name of defendant's attorney inserted in the record, it was *Held*, that an amendment should be allowed, to sustain the judgment in its priority over a subsequent judgment; it not appearing that the latter was for a debt contracted since the plaintiff's judgment was docketed. The omission of an attorney, as well as that of the clerk, is a mistake of an officer of the court, against which relief should be granted. (*Close a. Gillespey*, 3 *Johns.*, 526.)

J. R. gave a bond and warrant of attorney to his creditor, who entered judgment and issued execution, but by mistake all the proceedings and the judgment were in the name of E. R. J. R. consented to an amendment, but subsequent

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Leave may be granted to the plaintiff to amend the confession, as against the defendant, by supplying defects in the statement according to the facts proved on motion to set it aside.

Plaintiff was a grocer, and defendant resided with his family in his vicinity. De-

judgment-creditors, though they had had actual notice of the judgment, objected. The court, however, allowed an amendment. (*Hart a. Reynolds*, 3 *Cow.*, 42, *note.*)

Where judgment was signed, and mailed to the clerk to be filed, but never received by him, and plaintiff issued execution, on which, together with subsequent executions of other judgment-creditors, who had actual notice of plaintiff's execution, levy and sale was made, and the proceeds paid over, under order of court;—it was *Held*, that a motion to require plaintiffs to repay the moneys, and give the other judgment-creditors preference, on the ground that he had no judgment, must be denied. 1. The moneys had passed beyond the power of the court, and could not be recalled on a motion.

2. The defect was amendable, under the circumstances of the case; and the plaintiff should be allowed to file his record *nunc pro tunc*. (*Chichester a. Cande*, 3 *Cow.*, 89.)

A void judgment is not amendable, if the signing is by an officer who has no authority to sign such record—*e. g.*, a judge of the Common Pleas, not of degree of counsellor, where the sum exceeds \$500; in which case the record must, by 2 Rev. Stat. (282, § 35), be signed by the first or other judge of the degree of counsellor, or by the clerk,—there is no signing within sections 11 and 12; and an amendment cannot be allowed by signing *nunc pro tunc*, so as to save the lien of the judgments, or priority of executions, as against subsequent judgment-creditors. (*Butler a. Lewis C. P.*, 10 *Wend.*, 541; affirmed, in *Ct. of Errors* (1835), *sub nom.* *Judges of Lewis C. P. a. People*, 15 *Wend.*, 110.)

In the same case, it appearing that a judgment-record was first regularly signed by the clerk, and the attorney subsequently entered a common rule, vacating such signing, and procured the roll to be signed by the officer who had no authority to sign;—it was *Held*, that the judgment was legally signed, and should be sustained. (15 *Wend.*, 110.)

Under 2 Rev. Stat. (424, §§ 7, 8), it was held that the court might amend a judgment recovered by action, which, through the error of the clerk, was docketed for less than its amount; such amendment, as against the defendants, is almost a matter of course. Judgment-creditors, &c., should have notice of the application; and those who claim under the defendant, as subsequent *bona-fide* purchasers, mortgagees, and incumbrancers, or as judgment-creditors, who have given defendant indulgence, should be protected. But the mere holding of a subsequent judgment, it was held, is no answer to the motion. (*Hunt a. Grant*, 19 *Wend.*, 90.)

In the Bank of Rochester *a.* Emerson (10 *Paige*, 359), it was held that though there was no doubt of the power of the Court of Chancery to correct or supply the errors or omissions of its clerks, and other officers, in furtherance of justice, the court would not give permission to file and confirm a report *nunc pro tunc*, for the purpose of giving the party applying a preference over other creditors, which he had lost, by the neglect of his solicitor to pay the fees necessary to secure the filing of the report, when it was delivered to the clerk.

A warrant of attorney accidentally omitted to be filed with the judgment-

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defendant's confession of judgment, stated that a part of the indebtedness arose on his promissory note, dated May 1, 1856, given by defendant to plaintiff "for groceries, goods, and merchandise furnished to me before that time by the plaintiff, and from his store," and specified the amount of interest due.

record, entered on bond and warrant of attorney, may be filed *nunc pro tunc*. So held, on motion of both defendant and a junior judgment-creditor to vacate the execution. (*Supreme Ct., Sp. T., 1845, Jordan v. Posey, 1 How. Pr. R., 123.*)

On filing a statement, for judgment by confession, the clerk of court entered the judgment, but omitted to indorse the same upon the statement, as required by the statute; and afterwards, another creditor, with notice of this defect, procured a judgment by confession against the same defendant. Subsequently, the clerk refiled the former statement, and perfected judgment thereon anew.

Held, on motion of the plaintiff in that judgment, that an amendment should be ordered, by vacating the second entry and filing the statement regularly, *nunc pro tunc*, as of the time when it was originally delivered to the clerk, so as to preserve the priority. (*Neele v. Berryhill, 4 How. Pr. R., 16.*)

In *Mann v. Brooks*, it was further held that the court have power to order the record of a judgment by confession to be amended as of the day it was filed, and without notice to subsequent judgment-creditors. (*7 How. Pr. R., 449; affirmed, 8 Ib., 40.*)

In *Davis v. Morris* (1855, 21 *Barb.*, 152), it was held that where the good faith of the indebtedness sought to be secured by a confession of judgment is not questioned, and it does not appear that any superior equities subsist in favor of other creditors, the court should permit an amendment of defects in the statement, so as to preserve the lien and priority of the judgment.

Two later cases, however, go towards supporting the proposition that the amendment, if allowed, must save the rights of any intervening judgment-creditors, without reference to any comparison of equities.

Thus, where the transaction was in good faith, and the defect in the form of the confession arose from a misapprehension of the practice, the court nevertheless refused to permit an amendment so as to preserve the priority of the judgment, as against subsequent judgment-creditors. (*Boyden v. Johnson, 11 How. Pr. R., 503.*)

So where upon a motion to set aside a judgment upon confession entered upon an insufficient statement of indebtedness, an order was granted allowing an amendment, it was qualified so as not to interfere with the rights of any judgment-creditors which might have in the mean time attached. (*Johnston v. Fellerman, 13 How. Pr. R., 21.*)

On the hearing of the motion of a judgment-creditor to vacate a judgment entered by confession upon an insufficient statement, the plaintiff supplied all the defects in the statement, and showed that they were attributable, not to the plaintiff, but to the misapprehension of his attorney, and asked leave to amend it accordingly.

Held, 1. That the defects were not mere irregularities; that the judgment was void; and that the court had no right to authorize a new judgment under the form of an amendment, which should take priority over other judgments subsequently recovered.

2. That as an amendment without prejudice to subsequent judgments would be

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Held, insufficient, as not showing within what period the goods were furnished, nor the facts on which interest could be claimed.

A part of the indebtedness was stated to be "for groceries, goods, and merchandise furnished to me since the 1st day of May, 1856, by the plaintiff from his store." The statement was dated March 31, 1857.

Held, that these dates, and the nature of the goods sold as stated, sufficiently disclosed the facts out of which this part of the indebtedness arose.

Motion by judgment-creditor to vacate a judgment entered by confession.

F. W. Geissenhainer, Jr., and *Henry W. Eastman*, for the motion.

Wm. H. Onderdonk, opposed.

W. W. SCRUGHAM, J.—The question to be decided is, whether the statement upon which the judgment by confession was entered in this action, is sufficient to authorize such judgment.

Subdivision 2, of section 383 of the Code, requiring that "it (the statement) be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due."

The question as to the degree of particularity requisite under this section has been frequently presented, and the opinions ex-

worth but little to the plaintiff, the better course was to vacate the judgment. (*Von Beck a. Shuman*, 13 *How. Pr. R.*, 472.)

In *Hammond a. Bush* (8 *Abbotts' Pr. R.*, 152), it was held that the court have no power to allow an amendment of an insufficient statement and confession of judgment, so as to render the judgment entered upon it valid, as against intervening *bona-fide* purchasers or incumbrancers.

Where the confession of judgment, and the judgment entered thereon, were erroneous in many material respects, the court refused to allow any amendment. (*Supreme Ct., Sp. T.*, 1855, *Allen a. Smillie*, 1 *Abbotts' Pr. R.*, 354; *S. C.*, 12 *How. Pr. R.*, 156.)

See also *Buchan a. Sumner* (2 *Barb. Ch.*, 165), in which it was held that a statute (*Laws of 1844*, 90, ch. 104, § 7) authorizing the Supreme Court, the Court of Chancery, the New York Superior Court, and Mayors' Courts of cities, and Courts of Common Pleas, to direct the amending of the dockets of their judgments, in the office of the clerks of counties, and the docketing thereof *nunc pro tunc*,—did not give the court power to amend a docket so as to give the judgment amended a priority over another judgment docketed before the enactment of the statute; for such a statute does operate retrospectively.

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pressed, by the justices who have considered it, are conflicting; some of them holding that it should be as precise as that required under the act of 1818, while others have considered that no such precision is necessary.

The opinions given in the cases which have reached the Court of Appeals, strongly indicate a disposition to require a degree of particularity, almost, if not quite as great as that which was decided to be necessary under the act of 1818; but the decisions in those cases have settled no rules for the construction of these statements, excepting that it is not sufficient merely to state and set out a promissory note, executed by the defendant to the plaintiff, as the consideration of the indebtedness, or to set out and state such a promissory note, alleging that it was given on a settlement of accounts on a specified day between the debtor and the plaintiff in such judgment.

The object of the Legislature in enacting this provision, was to protect creditors against the frauds so easily perpetrated under the former system of confessing judgment by bond and warrant of attorney; and to carry this object into effect, the debtor should be required to state the facts out of which the indebtedness arose, with at least so much particularity as to enable other creditors, as is remarked in *Chappell v. Chappell*, "to compare such statement with the known circumstances and relations of the debtor, and thus to form a more accurate opinion as to his integrity in confessing the judgment than was possible under the former system."

The affidavits of both the plaintiff and defendant, read in opposition to this motion, show that the plaintiff was a storekeeper at Manhasset, in Queens county; that the defendant resided with his family near the plaintiff's store, and was in the habit of dealing there for groceries and other articles consumed in his family. They also show that the debt upon which this judgment is founded, was a just debt, and a very full and precise bill of particulars of its items is annexed to them. They may be used to supply deficiencies in the statement upon which the judgment is founded, and to authorize its amendment, but not so as to give that judgment priority over other judgments entered before such amendment. A judgment entered upon an insufficient statement is to be deemed fraudulent and void as to the other judgment-creditors of the defendant; and it

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would be improper to allow an amendment to their prejudice. In the case under consideration, the statement upon which the judgment was entered was as follows :

The above indebtedness arose as follows : The sum of three hundred and ninety dollars thereof on a promissory note, dated the 1st day of May, 1856, given by me to the said plaintiff for value received, to wit, for groceries, goods, and merchandise furnished to me before that time by the above-named plaintiff, and from his store.

The sum of twenty-four dollars and ninety-seven cents, being the amount of interest on said note to this date.

The sum of two hundred and forty-one dollars and fifty-eight cents for groceries, goods, and merchandise furnished to me since the 1st day of May, 1856 (when the said note was given), by the above-named plaintiff, and from his store.

There is nothing in the first branch of this statement showing the period at which, or within which, the groceries, goods, and merchandise therein mentioned were furnished to the defendant, excepting only that they were furnished before the note was given ; nor is there any thing in any branch or part of the whole statement, or in the known circumstances or relations of the parties, from which any inference in that respect could be drawn.

If it could be considered sufficient in other respects, I think this deficiency would be fatal to it.

The second branch of the statement depends entirely upon the first, and is open to the further objection that the facts out of which an indebtedness for interest could arise, are not stated, and cannot be inferred from any part of the whole statement. It does not appear when the note referred to became due, or whether or not it carried interest from its date.

The third branch of the statement alleges an indebtedness of \$241.58 for groceries, goods, and merchandise furnished to the defendant since the 1st of May, 1856, by the plaintiff, and from his store. The statement is dated March 31, 1857, and it thereby appears that these articles were furnished between the 1st May, 1856, and 31st March, 1857. The period during which they were furnished is, I think, sufficiently expressed.

The known circumstances and relations of the parties were, that the plaintiff kept a country store at Manhasset, the defend-

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ant, with his family, resided near that store, and was in the habit of dealing there for articles used in his family.

Taking these circumstances and relations into consideration, I think the allegation that the groceries, goods, and merchandise were furnished from the store of the plaintiff, sufficient to indicate their general nature, and to furnish, with the other allegations, and especially the statement of the period during which the articles were furnished, indications from which the creditors of the defendant would be enabled to judge of the *bona-fides* of the confession with nearly as much accuracy as from a bill of particulars.

The order will be that the lien of this judgment, to the extent of \$241.58, and interest thereon from April 2, 1857, and \$5 costs of entering the same, have priority, and the balance is postponed to the lien of the judgment of John H. Chapman and James A. Chapman, recorded in this court, and entered in the office of the clerk of the county of Queens, on the 14th day of July, 1857, for \$455.37, damages and costs. And leave is granted to the plaintiff, Thomas McKee, to amend the statement of confession upon which this judgment was entered, in accordance with the facts set forth in the affidavit of the defendant, Richard Tyson, read in opposition to this motion: such amendment, however, is not to affect the priority of any lien upon the real estate of said defendant, acquired before such amendment shall be made.

No costs of this motion are allowed to either party.

SHANCHAN *a.* THE NEW YORK AND NEW HAVEN RAILROAD COMPANY.

Westchester County Court, May, 1860.

A foreign railroad corporation running its trains over the road of a railroad corporation of this State, is not liable for an injury to cattle caused by its train, but to which the negligence of the owner contributed, though the road has not been fenced as required by the act of 1850.*

* The contrary was held in *LABUSSIERE a. N. Y. & NEW HAVEN RAILROAD COMPANY* (*New York Common Pleas; General Term, April, 1860*, DALY, HILTON, and BRADY,

Shanchan *a.* The New York and New Haven Railroad Company.

W. H. Pemberton, for appellant.

H. Spratley, for respondent.

BY THE COURT.—ROBERTSON, J.—This was an action for an injury occasioned to plaintiff's cow in July, 1858, by the defendants' engine, while passing over the track of the New York and Harlem Railroad Company. The track was unfenced at the place where the injury occurred. The cow had been accustomed to run at large, and was wrongfully upon the track. The jury rendered a verdict for the plaintiff, and from the judgment entered thereon the defendant appealed.

The defendant was a foreign corporation, and was not bound to fence the track in question. The act of 1850 imposed that duty upon another. That act does not apply to the defendant. The plaintiff could only recover at common law, and as his negligence contributed to the injury, he was not entitled to recover.

Judgment reversed, with costs.

JJ.)—That action was for damages in killing plaintiff's cow on the Harlem Railroad, the place where the accident occurred not being fenced, and the facts being similar to the above case. The cause was brought in the Seventh District court in this city, and the jury rendered a verdict for the plaintiff, from which the defendant appealed.

Elbridge T. Gerry, for the appellant.

Freeborn G. Luckey, for the respondent.

The court held, that the appellant could not set up the negligence of the plaintiff in permitting his cow to run at large, as matter of defence. The company is liable under the statute (2 *Rev. Stat.*, 5th ed., 690, § 56), for accidents occurring by reason of defects in the fences and cattle-guards on the Harlem, as well as on their own immediate line of road. The Harlem road is in fact their line of road.

Judgment of the court below affirmed, with costs.

HOEY *a.* KINNEY.*Supreme Court, First District; Special Term, June, 1860.*

SURPLUS.—JUDICIAL SALE.

A sale of a decedent's real property at a judicial sale, does not convert it into personalty; and an application to the court by a creditor for payment of the surplus, must be founded on an order of the surrogate for the sale of the decedent's real property, and payment of the applicant's demand.

Motion for application of surplus.

LEONARD, J.—Where a person dies owning real estate, a sale subsequently made by the operation of law or judicial proceeding, does not convert the proceeds into personal estate. This court has no jurisdiction to inquire or determine whether the deceased left personal estate sufficient for the payment of his debts, or to direct the sale of real estate for that purpose in case the personal is insufficient.

The administrator must file his inventory and take the other requisite steps before the surrogate, and procure an order for the sale of the real estate of the deceased. This proceeding before the surrogate also involves an investigation of the creditors' demand, which, in the proceeding now before this court, cannot be had.

If the administrator shall succeed in proving his demand before the surrogate, and in procuring an order for the sale of real estate, he can then properly apply to this court on the adjudication of the surrogate, and obtain an order for the proceeds of the real estate so ordered to be sold, which may be under the control of this court. At present the application is denied, without prejudice to a renewal of the motion after the proper proceeding has been taken before the surrogate.

DODGE a. DODGE.

Supreme Court, First District; General Term, June, 1860.

DOWER.—ELECTION.—INTENTION OF TESTATOR.

When it clearly appears by the will that the testator has distributed the residue of his property, after making provision for his widow, among his children, or other persons, in such proportion as he considered them entitled to, and that to allow the widow to take both the provision of the will and her dower out of the estate, would defeat, or materially lessen the allotments to all or any of the devisees or legatees,—the intention of the testator not to give her both the provision and dower out of his estate, is to be deemed plainly manifested, and the court should require the widow to elect.*

If a trust declared by the will is plainly inconsistent with any intention to allow the widow both her dower and other provision, she must be put to an election, even though the trust be void.†

Appeal from judgment at special term on a trial by the court.

This was an action to recover dower. The complaint, the material facts whereof sufficiently appear in the opinion, demanded judgment for a third part of the premises mentioned, and that the same be admeasured and set off to her, and for damages for its detention.

On the trial of the action, at a special term, it was conceded that the plaintiff had been duly paid the pecuniary allowance provided for her by the will. Judgment was given for the plaintiff, the court assigning the following reasons: "There is no

* In addition to the cases cited on the argument and in the opinion of the court, the reader may consult the following upon this subject:—*Ellicott a. Mosier* (3 *Seld.*, 201); *Swaine a. Perine* (5 *Johns. Ch.*, 482); *Jones a. Powell* (6 *Ib.*, 194); *Larrabe a. Van Alstyne* (1 *Johns.*, 307); *Van Orden a. Van Orden* (10 *Ib.*, 30); *Rathbone a. Dyckman* (3 *Paige*, 9); *Hawley a. James* (5 *Ib.*, 318); *Irving a. DeKay* (9 *Ib.*, 521).

† But it might be otherwise if the provision for the wife depended on the validity of the trust from which the testator's intention is inferred. (See *Hone a. Van Schaick*, 7 *Paige*, 221; *Howland a. Heckscher*, 3 *Sandf. Ch.*, 519.)

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probability that the testator intended that the plaintiff should have both provisions. Yet as he has not said so in terms, and there is no absolute incompatibility, she is entitled (under the authorities cited) to both, and is not obliged to elect."

From this judgment the defendants appealed.

E. W. Dodge, for the appellants.—I. From the whole plan of the will, it was manifestly the testator's intention to grant the homestead and annuity in lieu of dower. If the plaintiff preferred dower, she should have made her election within one year from his death. (2 *Rev. Stat.*, 4th ed., 150, § 13.) The authorities which hold that the widow need not elect unless the testamentary provision is inconsistent with the claim of dower, are not supported by reason, and should not be followed. (*Mills a. Mills*, 28 *Barb.*, 460 ; *Lewis a. Smith*, 5 *Seld.*, 511.)

II. Conceding the rule to be that the testator's intention, if deduced from an inconsistency between the will and the claim, must be clear and manifest, the question then is, Will the widow's dower disturb any of the provisions of the will? 1. It will subvert the annuity of \$400 charged on the four houses in West Eleventh-street. 2. It will subvert the "entire income" of the house No. 95 West Eleventh-street, which is given contingently to Josiah Dodge. 3. The exercise of the power given to trustees to lease the real property, is inconsistent with the claim of dower.

III. The provisions in favor of the widow were intended for her support, and in lieu of dower. Having accepted them, equity will hold her to her election.

Geo. T. Strong and *Marshall S. Bidwell*, for the respondents.—I. The widow's right of dower is an absolute legal right, founded on the highest consideration (7 *Pet.*, 393 ; 1 *Bay.*, 232 ; *Co. Lit.*, 9, b ; 8 *Paige*, 328, 5 *Hill*, 207 ; S. C., in error, 2 *Den.*, 430 ; 1 *Sandf. Ch. R.*, 324) ; and the burden is on the defendants to show clearly that she has deprived herself of her right. (10 *Paige*, 269.)

II. The question then is, is there such an irreconcilable inconsistency between her dower and the provisions of the will, that effect *cannot* be given to both? "It should be clear, plain, and incontrovertible, that the testator could not possibly have given what he has given consistently with her claim of dower."

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(*French a. Lewis*, 2 *Ves. Jr.*, 578, cited 1 *Pow. on Dev.*, by *Jarm.*, 454, note; 5 *Law Lib. N. S.*; see also *Fuller a. Yates*, 8 *Paige*, 325; *Sanford a. Jackson*, 10 *Ib.*, 266; *Jackson a. Churchill*, 7 *Cow.*, 287; *Bull a. Church*, 5 *Hill*, 206; 2 *Den.*, 430; *Havens a. Havens*, 1 *Sandf. Ch. R.*, 324; *Lewis a. Smith*, 5 *Seld.*, 502; *Lasher a. Lasher*, 13 *Barb.*, 106; *Seldon a. Bliss*, 4 *Seld.*, 35; *Harrington a. Hughes*, 1 *Paige*, 569; *Gibson a. Gibson*, 17 *Eng. Law & Eq. R.*, 349; 2 *Story's Eq. J.*, § 1088; 4 *Kent's Com.*, 58.) The gift of an annuity and its charge on lands do not interfere with her right of dower; for the personality is not exonerated, and, therefore, is the primary fund. (*Town a. Lord Rens*, 18 *Ves.*, 132; *Tait a. Lord Northwick*, 4 *Ib.*, 816; *Lupton a. Lupton*, 2 *Johns. Ch.*, 614; *Livingston a. Newkirk*, 3 *Ib.*, 312, 319; *Seaver a. Lewis*, 14 *Mass.*, 83; and see *Smith a. Kinskern*, 4 *Johns. Ch.*, 9; *Wood a. Wood*, 5 *Paige*, 596, 599; *Fuller a. Yates*, 8 *Paige*, 321.) Even if the annuity were a mere rent-charge, she would, nevertheless, be entitled to dower. (*Holditch a. Holditch*, 2 *Yo. & Col. Ch.*, 18, 21, 22; *Foster a. Cook*, 3 *B. C. C.*, 347; *Dawson a. Bell*, 1 *Kern.*, 761; *Hanson a. Hanson*, *Ib.*, 767.) The devise of the houses in 11th-street is in terms subject to incumbrances, and her dower is an incumbrance. (*Jones a. Gordon*, 10 *Johns.*, 266; 4 *Mass.*, 630; 22 *Puck.*, 447; 2 *Greenl.*, 22; 3 *Ves.*, 253.) A gift to trustees to receive the rents and profits is not necessarily inconsistent with the right of dower. (*Lawrence a. Lawrence*, 2 *Frem.*, 234; 1 *B. P. C.*, 591; 3 *Ib.*, 484, and see cases above cited.)

III. The dictum in *Savage a. Burnham* (17 *N. Y. R.*, 561, 577, 578), is not an authority. The widow in that case died before the case was decided at special term; there was no party to represent her, the question was not raised below, nor discussed in the Court of Appeals, nor passed on in its judgment.

IV. The case of *Mills a. Mills* (28 *Barb.*, 460), is decisive of this case.

V. If the widow were put to her election, the law allows her a reasonable time to make it, after she ascertains, by a judicial construction, what her rights are (4 *Kent's Com.*, 57; *Adsit a. Adsit*, 2 *Johns. Ch.*, 451; *Hone a. Van Schaick*, 7 *Paige*, 222, 223), and she is, therefore, not yet barred, under any view of the will.

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BY THE COURT.*—MULLEN, J.—The only question presented by the appeal in this case is, whether, under the provisions of the will of Josiah Dodge, deceased, the widow is compelled to elect between the provision made for her by the will, and her dower, or whether she is entitled to both the provision and the dower?

The will devises to the wife, during her life, the use of the homestead at Troy, in Cheshire county, New Hampshire, except such part as he bequeathed to his son. He further bequeathed to her an annuity of \$400 during life, payable semi-annually in sums of \$200 each—the first payment to be made in six months from his decease. This annuity was charged upon the testator's real estate, situate in West Eleventh-street, in the city of New York. That real estate was disposed of as follows: Lots No. 89 and 93 to his daughter, Mrs. Flagg; and to his son, No. 91. It was further provided by said will that said lots should be holden to pay their respective shares of said annuity, in proportion to their assessed valuation in the public inventory of property. It was also provided that said Josiah should never possess the right to sell said premises, but they shall be held by a competent trustee, to be appointed by the Probate Court, which said trust shall cease at the death of said Josiah, and that said Josiah shall not receive any income from the rents or profits of said premises, unless he shall become the head of a family, in which case the entire annual income shall accrue to him; or if Josiah remain single at the age of forty years and upwards, and become infirm or unable to support himself, the trustee is directed to grant him an annuity of \$100 for his support. It was further provided by said will that, as there are certain incumbrances upon the Eleventh-street property, the proceeds and profits of said estate, after the necessary current expenses are paid therefrom, shall be appropriated as far as necessary, and are made liable to pay said annuity.

These are all the provisions of the will in relation to the Eleventh-street property.

It seems that the testator died possessed of a considerable amount of personal property, and seized of other real estate in New York and New Hampshire. He gave portions of the real

* Present, SUTHERLAND, MULLEN, and LEONARD, JJ.

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estate out of the city of New York to each of his children, and to some of them shares of his personal estate.

Whether the division of his estate among his children was an equal one, neither the pleadings nor the evidence enable us to determine. It is enough for us to know that he was competent to understand the claims of the several members of his family upon his bounty, and he is to be presumed to have made such a division of his property as was right and just, in view of the situation and claims of his wife and children.

The right of the widow to dower in the lands of her husband, is superior to all other liens and claims upon it, not created by her act, or existing at the time of the marriage. The husband cannot, by any act of his, deprive her of this right. If he makes provision for her by his will, and does not declare that it shall be in lieu of dower, she is, as a general rule, entitled to both provision and dower. (Fuller *v.* Yates, 8 *Paige*, 325.)

Whether she is entitled to both, or is put to her election between the provision in the will and dower, is a question of intention on the part of the testator.

The intention to give both is presumed, unless the other provisions of the will are such as to manifest an intention to put her to her election. (Lewis *v.* Smith, 5 *Seld.*, 502.)

It has been held not to be enough that the other provisions of the will will be interfered with, but it must clearly appear that the testator would not have distributed his property in the manner in which it is distributed by the will, had he contemplated that the widow could have claimed, or been entitled to her dower in addition to the provision in the will.

When a testator makes a provision in his will for his widow, without declaring it to be in lieu of dower, and devises the residue of his property among other persons, it would seem to be an indication that he intended the division thus made should not be disturbed by his wife's claiming dower out of the property thus distributed. But such a devise of the residue of the estate after making provision for the wife, has not been held such conclusive evidence of an intention to put the widow to her election, as to induce the courts to compel her to elect. Some more decisive evidence of intention has been required.

It seems to me, that when it clearly appears by the will that the testator has distributed the residue of his property, after

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making provision for his widow, among his children or other persons in such proportion as he considered them entitled to, and that to allow the widow to take both the provision of the will and her dower out of the estate, would defeat or materially lessen the allotments to all or any of the devisees or legatees—that the intention of the testator not to give her both the provision and dower out of his estate, is plainly manifested, and the court should require the widow to elect.

The rule that has heretofore prevailed, has in very many cases operated oppressively and unjustly on heirs and legatees, and most frequently in cases where either the dower or the provision of the will was amply sufficient for the wife, while giving her both, was ruinous to others entitled under the will.

In this case, it seems to me, that the provisions of the will in behalf of the children demonstrate, that it was not the intention of the testator to give the widow both dower and the provision. If she is entitled to the annuity, she takes it without diminution; if she takes dower, she is entitled to one-third part of each house and lot on which that annuity is charged. The remaining two-thirds then must have charged upon them the whole of the share of such lot in payment of the annuity. If one-third of the annuity was extinguished with the assignment of the dower, in the Eleventh-street property, there would be less ground of complaint. But no such result is attainable. The whole annuity must be paid, and two-thirds of the property charged with it, must pay it.

Again, lot 95 West Eleventh-street is, by the will, given to a trustee in trust to receive the rents and profits to be paid over under certain restrictions and limitations to Josiah during his life. It was intended as a provision for the support of himself and family, if he should have one; and if the widow takes dower, one-third of the means of support thus provided, is taken away. Was such the intention of the testator? It seems to me not.

The trust created, or intended to be created by the will for the benefit of Josiah, would be entirely inconsistent with the right of the widow to dower. But it is said that the trust is invalid, and is, therefore, to be considered as if no such provision was contained in the will. I do not agree to the conclusion. The controlling consideration in the construction of the will is the

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intention of the testator. And if the creation of the trust manifests an intention inconsistent with the right of the wife to the provision and dower, it cannot change the intention, if the trust is subsequently declared illegal and void. The testator deemed it valid when he made it. It was one of the means which he adopted to give effect to his intention, and whether legal or illegal, the intention manifested by the provision should have effect.

Without occupying more time in discussing the question, I must declare my conclusion to be that under the provisions of this will, the widow must be put to her election between the provision of the will and her dower. She cannot have both.

CLEVELAND a. PORTER.

Supreme Court, First District ; At Chambers, February, 1860.

APPEARANCE.—OPENING JUDGMENT OBTAINED ON SERVICE OF ONE OF SEVERAL DEFENDANTS.

Where the circumstances under which judgment against several joint debtors was obtained on service of summons upon one only, were such as to countenance suspicion that it was obtained by connivance of the defendant served—it was opened on motion of another defendant, to let in his defence.

Motion to open judgment, and to be let in to defend.

This was an action against several defendants on a joint liability. An action was previously commenced against them by the same plaintiff, but dropped on account of an irregularity in omitting a subscription to the summons. The plaintiff then brought this suit, in which he served summons on the defendant, Otis R. Porter, alone ; subsequently his attorney informed one of the other defendants that no suit would probably be commenced against him. After judgment on the default of the defendant who was served, the defendant William D. Porter moved to be let in to defend.

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LEONARD, J.—When the plaintiff's attorney informed the attorney for the defendant, Lacony, that he considered the summons void, and that no suit was in fact pending, the defendant's attorney did not dispute the proposition. On the contrary he acquiesced in it, and received \$10 from the plaintiff's attorney in payment of his costs. None of the defendants can claim any relief, affirmatively, in consequence of the omission to sign a consent or enter an order for discontinuance. Lacony is precluded by the action of his attorney; and the other defendants are not entitled to avail themselves of the want of such consent in writing, or the want of an order of discontinuance.

Subsequently, on the application of the attorney for the defendant Lacony, the plaintiff's attorney informs him by letter that in consequence of the summons not being subscribed he considered that there is no suit pending, and that no suit would probably be commenced against his client. This communication was shown to the defendant, Wm. D. Porter, or he was informed of it. The fact was that a new suit had been commenced, and the summons and complaint had been served on the defendant, Otis R. Porter, five days before this communication was written. It was not strictly true, and might mislead, and probably did mislead, the defendant Wm. D. Porter.

It appears from the answer of Lacony, that all the defendants, being joint obligors, had a defence and counter-claim, *prima facie* good, and sufficient to defeat the plaintiff's action.

The defendant, Otis R. Porter, who alone was served with the process on which judgment was entered, allowed judgment to be taken by default for want of an answer, and judgment was thereon entered in form against all the defendants as joint obligors.

On this present motion, Otis R. Porter makes an affidavit to resist the application of Wm. D. Porter, to be let in to defend.

These circumstances give some countenance to the suspicion that the judgment, authorizing as it does, a levy on the joint property of the defendants, was obtained by connivance between the plaintiff and Otis R. Porter.

The defendant, Wm. D. Porter, must be allowed to serve an answer and counter-claim to the complaint herein, and the plaintiff's attorney must furnish the said defendant or his attorney

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with a copy of the summons and complaint. The judgment and subsequent proceedings to stand as security, but all further proceedings thereon are to be stayed until determination of the issues so to be made between the plaintiff and Wm. D. Porter.

The costs of this motion are fixed at ten dollars, to abide the event of the said issue.

MATTER OF PIE.

Supreme Court, First District; At Chambers, February, 1860.

INSOLVENT'S DISCHARGE.—DEMAND ARISING ON CONTRACT.

An insolvent is not entitled to his discharge from an indebtedness which arose from his embezzlement of money and evidences of debt, which came to his possession as a clerk in the course of his employment as such; but this must be clearly shown; the mere statement in the petition that the demand arose when he was clerk of the creditors, for money, &c., which he had in his possession, and did not account for, and appropriated to his own use,—is not sufficient ground for denying the discharge.

Application for a discharge in insolvency.

LEONARD, J.—It appears exceedingly probable that the demand of the creditors of this insolvent arises from an embezzlement by him as a clerk, of the money, &c., of his employers.

It is open to the parties respectively to establish, whether the demand in question does or does not arise on contract, and also for the petitioner to prove, if such is the fact, that the creditors have waived the tort. Had it unquestionably appeared from the petition that the insolvent had the evidences of debt, &c., of his employers in his possession *as their clerk* at the time he appropriated them, it would have then been established by his own admission that this claim did not arise on contract, in my opinion.

He says the demand was contracted at a time when he was a clerk of the creditors, for money and evidences of debt which he had in his possession, and did not account for, and appro-

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priated to his own use. Had he admitted that the funds came to his possession as *such clerk in the course of his employment*, I think he would have made a clear case against himself. His admission falls a little short of it. There is enough stated to render such a cause probable, but not conclusive.

If the funds came to the possession of the insolvent in the course of his employment, as clerk of the creditors, he was bound to deliver to them the same evidences of debt, with which he had been intrusted, or the specific proceeds thereof. If he failed to do so it was a statute crime, and by the civil law is a tort. It would not, in such case, be a contract. There would be no *consent* on the part of the creditors; and consent, is an essential element of a contract.

In this aspect (if true), the case differs from *Walter a. Bennett* (16 *N. Y. R.*, 250), because in that case there was no obligation to deliver to the plaintiffs the check in question, or the *specific* proceeds thereof. The defendant in that case had the legal right to do just what he did. If he had been sued for refusing to pay over money received in a fiduciary capacity, the plaintiff would not have been nonsuited. The plaintiff failed in that action because he claimed a wrongful conversion arising from the deposit by the defendant to his own credit in bank of the proceeds of a check received in payment for property sold by the defendant as the factor or agent of the plaintiff. The plaintiff claimed in that suit the specific proceeds of the check, and that the failure to deliver such proceeds to him was a wrongful conversion.

I do not think the discharge of the insolvent can at present be denied on the ground which has been here discussed.

I omit to discuss the other questions raised on behalf of the creditors, but shall, for the purposes of this motion, hold them to be untenable.

The creditors are entitled to an examination of the insolvent, and for that purpose he must procure the proper order to enable the examination to be had, by causing the sheriff to produce him in court for that purpose.

GOULD v. SHERMAN.

Supreme Court, First District; Special Term, April, 1860.

ARREST.—MOTION TO DISCHARGE.

On motion to discharge from arrest in an action for malicious prosecution, it is sufficient if the plaintiff shows *prima facie* a sufficient cause—*e. g.*, an immediate dismissal by the magistrate, of the prosecution.

Motion to discharge from arrest and for an *exoneretur*.

The action was for malicious prosecution. Defendant was arrested on an order granted October 27, 1859, by the Justice, Ingraham, and was held to bail in the sum of \$5000. He now moved, on affidavits, to be discharged, and that his bail be exonerated. The leading facts in the case are stated in the opinion.

BONNEY, J.—On 25th October, 1859, the defendant in this action charged the plaintiff, before one of the police justices of this city, with the crime of perjury, alleged to have been committed in swearing to an answer put in by the Cumberland Coal and Iron Company, of which the plaintiff was then president, to a petition exhibited by the defendant and others, against said company and others, in the Circuit Court of Alleghany county, in Maryland. On that charge a warrant was issued, and the plaintiff was arrested and brought before the police justice, who on 27th October, dismissed the complaint, and discharged the plaintiff from arrest.

For this proceeding, the plaintiff, immediately after being so discharged, commenced this action for malicious prosecution, and procured the defendant to be arrested and held to bail in the sum of \$5000.

The complaint in this action alleges that the charge before the police justice was made falsely, maliciously, and without any reasonable or probable cause, and with intent to harass, scan-

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dalize, and injure the plaintiff, and claims damages to the amount of \$25,300. The defendant has answered, and on pleadings and affidavits now moves to vacate the order of arrest, and that his bail be discharged.

The question to be decided is, whether the defendant has shown such probable cause for making the charge against the plaintiff as justified him in causing his arrest. The immediate dismissal of the complaint by the magistrate is *prima-facie* evidence that it was made without cause; but the defendant insists that it was so dismissed on technical objections, and that the plaintiff has never yet attempted to maintain that the statements in said answer, to which he made oath, were true. The plaintiff, on the other hand, shows, by affidavits, other facts tending to prove—as his counsel insists—that the whole proceeding on the part of the defendant was malicious, and its intent was to defame and injure the plaintiff; and that the principal statements in said answer, alleged by defendant to be untrue, were taken from the papers of the Coal and Iron Company, or from statements of persons connected with said company, which the plaintiff had reason to believe and did believe to be correct and true, and that this was well known to defendant, who was formerly connected with, and a chief manager of, that company. From the voluminous papers read or referred to on this motion, it is manifest that a bitter controversy exists between the parties to this action, and others, in relation to the affairs of the Cumberland Coal and Iron Company, and that the complaint before the police magistrate was probably induced quite as much by personal animosity as by any regard for public justice. The plaintiff showed *prima facie* sufficient cause for arresting the defendant, who has given bail, which certainly is not excessive if this action can be maintained. I cannot now try the case on affidavits, nor with propriety express an opinion on the merits. It is sufficient for the present purpose for me to say that these papers do not show such cause for the charge made by defendant as to require that his bail be discharged.

The motion is denied, with \$10 costs.

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PEOPLE *a.* SHAY.

Supreme Court, First District; Oyer and Terminer, February, 1860.

Again, General Term, March, 1860.

 INDICTMENT.—DISQUALIFICATION OF WITNESS BY SENTENCE FOR
 . CRIME.

In an indictment for murder, the omission of the word “with” in stating the instrument with which the fatal blow was given, may be regarded as a clerical mistake, if it is substantially alleged that the blow was given with the instrument.

Being sentenced on a conviction for petit larceny, does not disqualify as a witness.

Motion in arrest of judgment; and writ of error.

I. February, 1860.—The prisoner had been tried at the Oyer and Terminer on an indictment for the murder of one Leary, and was convicted. His counsel now moved an arrest of judgment on account of a defect in the indictment.

Henry L. Clinton, for the motion.

Nelson J. Waterbury, district-attorney, opposed.

INGRAHAM, J.—In this case the prisoner has been tried, and convicted of murder. No objection was taken on the trial, or previous thereto, to the form of the indictment. A motion is now made on behalf of the prisoner in arrest of judgment for the omission of the word “with” in the indictment, before the description of the weapon used by the prisoner. The mistake is evidently a clerical one; but still, if material to charging the offence, would be available. The clause in the indictment reads as follows: “That the said Mortimer Shay—a certain knife which he, the said Mortimer Shay, in his right hand then

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and there had and held, him, the said John Leary, in and upon the forehead, then and there wilfully and feloniously, and of his malice aforethought, did beat, strike, stab, cut, and wound, giving unto the said John Leary, then and there, with the knife aforesaid, in and upon the forehead of the said John Leary one mortal wound," &c. I cannot conclude that the omission of the word "with" before the words "a certain knife" is such a defect in substance as to warrant granting this motion. The indictment would read so as to charge the offence, if those words were included in a parenthesis:—"That the said Mortimer Shay (he the said Shay holding a knife in his hand) did stab, beat, strike, and wound said Leary, and giving unto the said Leary, then and there with the knife aforesaid, a mortal wound," &c. The offence is fully stated without the word omitted; and although it is necessary to name the weapon with which the death was effected, the indictment sufficiently shows it, notwithstanding the omission of the word complained of. The cases cited by the prisoner's counsel are none of them applicable to this case. They relate to cases where the defect was in charging the offence; here it is merely in relation to the weapon with which the offence was committed, and in that respect the objection is remedied by the subsequent part of the count in the indictment, which charges expressly that the wound was given with the knife, and that of such wound the prisoner died. It seems to me that the offence is fully charged in the indictment, notwithstanding the omission of this word, and if so, it becomes a mere error in matter of form, which is cured by the statute:

Motion denied.

II. *March*, 1860.—Writ of Error. The prisoner then obtained an allowance of a writ of error on which the cause was brought before the Supreme Court, at general term.

BY THE COURT.*—SUTHERLAND, J.—At the last Oyer and Terminer held in this city, the prisoner, Mortimer Shay, was tried on an indictment for the alleged murder of one John Leary, and was convicted.

The case comes before this court by writ of error.

* Present, SUTHERLAND, ALLEN, and BONNEY, JJ.

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On the trial, among other witnesses, one Stephen Leary was called, and sworn as a witness on the part of the people, and the testimony which he gave was material to the issue.

It appearing that Stephen Leary had previously been convicted of petit larceny, at a court of general sessions of the peace, held in and for the city and county of New York, by a copy of the record of his conviction properly certified and introduced in evidence by the counsel for the prisoner, the counsel for the prisoner thereupon moved that the evidence of the said Stephen Leary be stricken out.

The court denied such motion, and refused to strike out such evidence; and the counsel for the prisoner then and there duly excepted to such refusal of the judge to strike out Stephen Leary's testimony.

The first question presented by the writ of error is, Did the judge err in refusing to strike out this testimony; or, in other words, was Stephen Leary a competent witness, notwithstanding his previous conviction of petit larceny?

The three chapters constituting the fourth part of the Revised Statutes, were passed as one act. That act is entitled "An act concerning crimes and punishments," &c.

By section one of title six of chapter one of that act (2 *Rev. Stat.*, 690), petit larceny is defined to be the "stealing, taking, or carrying away the personal property of another, of the value of twenty-five dollars or under;" and that section declares that the punishment of petit larceny shall be "imprisonment in a county jail not exceeding six months, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment."

Section twenty-three of title seven of the same chapter (2 *Rev. Stat.*, 701), declares that "no person, sentenced upon a conviction for felony, shall be competent to testify in any cause, matter, or proceeding, civil or criminal, unless pardoned," &c.; but that "no sentence, upon a conviction for any offence other than a felony, shall disqualify or render any person incompetent to be sworn or to testify in any cause, matter, or proceeding, civil or criminal."

Section thirty of the same title seven (2 *Rev. Stat.*, 702), declares that "the term felony, when *used in this act*, or in any other statute, shall be construed to mean an offence for which

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the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a state-prison."

It would appear to follow so clearly and conclusively, from these statutory provisions and definitions, that Stephen Leary was a competent witness in this case, notwithstanding his previous conviction of petit larceny, and that the judge did right in refusing to strike out his evidence, that it is difficult to see how even a question could be raised on that point. One provision of the act is, that no conviction, for any offence other than a *felony*, shall disqualify or render any person incompetent to be sworn, or to testify; and another provision of the same act defines the word "*felony*," *when used in the act*, to be an offence punishable by death, or imprisonment in a state-prison; and, by a third provision of the same act, the offence of petit larceny is defined; and it is declared to be punishable not by death or imprisonment in a state-prison, but by fine or imprisonment in a county jail, or by both such fine and imprisonment.

It follows so plainly, from these statutory provisions, that Stephen Leary was a competent witness, notwithstanding his previous conviction of petit larceny, that one would hardly look for, or expect to find, an authority outside of the statute on that point.

The case of *The People v. Alder* (3 *Park.*, 249), does not at all interfere with the plain construction of the statute. That case decides only that the definition of the word felony, in the Revised Statutes, applies only where the word is used in a statute, leaving petit larceny still a felony as at common law "in respect to all questions controlled solely by the common law." The question in *The People v. Alder* was such a question, unaffected by the statutory definition.

On the cross-examination, by the district-attorney, of Thaddeus Spencer, a witness called and sworn for the prisoner, the district-attorney put this question to the witness: "Do you know that the prisoner had a cutting match with any one previous to the killing of Leary?"

The witness was allowed to answer this question, after objection by the counsel for the prisoner. The answer was: "I do not."

As the answer could not possibly prejudice the prisoner, it is

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unnecessary to inquire whether the question, in reference to the testimony which had been given by the witness on his direct examination, was or was not proper.

The remaining question in this case is raised on the face of the indictment. That question is, whether the indictment, in charging the offence, sets forth with sufficient particularity and certainty, the manner of the death, and the means by which it was effected. The counsel for the prisoner insists that the indictment is fatally defective in this respect, and does not charge the crime of murder within the rules of criminal pleading, and therefore moves that the judgment be arrested.

The indictment, after alleging in the usual manner that the prisoner, on a certain day, at the first ward, in the city of New York, with force, &c., on and upon John Leary, wilfully, feloniously, &c., did make an assault, and then proceeds as follows: "And that the said Mortimer Shay, — a certain knife, which he, the said Mortimer Shay, in his right hand then and there had and held, him, the said John Leary, in and upon the forehead, then and there wilfully and feloniously, and of his malice aforethought, did beat, strike, stab, cut, and wound, giving unto the said John Leary, then and there, *with the knife aforesaid*, in and upon the forehead of him, the said John Leary, one mortal wound, of the breadth of one inch, and of the depth of three inches, of which mortal wound he, the said John Leary," &c.

The counsel for the prisoner insists that the evidently clerical mistake in the omission of the word *with*, before the description of the weapon, renders the indictment fatally defective; that although the indictment alleges that the fatal wound was given with the knife, yet, that in consequence of the omission of the word *with* before the word *knife*, in the preceding portion of the indictment, it is not alleged that the fatal *blow* or *stab*, &c., which caused the mortal wound, was given with the knife; that it does not appear, nor is it alleged, that the knife caused the mortal wound.

Now, without examining the authorities cited by the counsel for the prisoner to show the particularity required, in an indictment for murder, in setting forth the manner of the death and the means by which it was effected, and conceding, for the purposes of this question, that the indictment in this case should

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have substantially alleged that the mortal blow or stab was struck or made with the knife, yet I think this indictment does, in fact, so substantially allege. The indictment distinctly and certainly alleges three things: 1. That the prisoner then and there had and held in his right hand a certain knife. 2. That he did then and there beat, strike, stab, cut, and wound the deceased. 3. That he then and there gave unto the deceased, on and upon his forehead, with the knife aforesaid, one mortal wound, &c.

Now, is not this substantially alleging that the blow, stab, &c., were given *with* the knife?

It is certainly plainly alleged that the prisoner struck the deceased, having in his right hand a knife, and that he gave the mortal wound with the knife. Is not this substantially alleging that the prisoner struck the deceased with the knife, and that the knife caused the mortal wound? I think it is, and that the death, and the means, and manner, in and by which it was effected by the prisoner, is sufficiently and certainly charged in the indictment.

In my opinion, the judgment of the Oyer and Terminer should be affirmed.

HASTINGS *a.* THURSTON.

Supreme Court, First District; At Chambers, March, 1860.

PLEADING.—COMPLAINT IN CREDITOR'S ACTION.

In an action brought to set aside an assignment for fraud appearing on its face, the complaint is sufficiently definite and certain if it states the circumstances under which the assignment was made, sets forth the assignment, and alleges that it is fraudulent and void on its face. The reasons why it is deemed void need not be stated.

Motion that complaint be made more definite and certain.

The complaint in this action stated that plaintiff had been appointed receiver, under supplementary proceedings, on several

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judgments recovered against the defendant, Johnson, and had accepted the appointment, and was vested with all the rights and powers of such a receiver ; that on May 14, 1859, Johnson was owner and in possession of a large amount of property, real and personal, and then executed to the defendants, Thurston and Lefferts, an assignment (set forth at length) of certain real property, and of all his personal property, in trust for the purposes in the assignment expressed ; that Thurston and Lefferts had accepted the assignment, and claimed title to all the property therein mentioned. It then continued as follows :

“ And the plaintiff alleges and submits that the said instrument of assignment is fraudulent and void upon its face,” &c. “ And the plaintiff is informed and believes, and therefore charges, that the said instrument of assignment was made and executed by the said defendant, Jeromus J. Johnson, and accepted by the defendants, Thurston and Lefferts, with the intent to hinder, delay, and defraud the creditors of said Johnson,” &c.

The defendants, Thurston and Lefferts, now moved upon the complaint that these allegations be made more definite and certain, on the ground that they are so indefinite and uncertain, that the precise nature of the charge was not apparent.

BONNEY, J.—This motion is made under section 160 of the Code. The plaintiff, in his complaint, after showing his right, as the representative of creditors, to question the assignment, has set forth the whole assignment, with the schedules thereto, and then alleged that said assignment is fraudulent and void upon its face. The assignees (defendants) ask an order that this allegation be made more definite and certain, by stating why, or for what reason, said assignment is fraudulent and void. I have examined a great number of authorities to which reference was made on this point, but find no principle or decision which, in my judgment, requires or authorizes me to grant this part of the motion. The pleader must undoubtedly state all material facts, with proper definiteness and certainty. If he omit any material fact, his pleading is demurrable, and if his statement of it (the fact) is not sufficiently definite and certain, he may be required to amend. In this case the plaintiff has stated the circumstances under which the assignment was made, and set forth the whole assignment in its exact words, and then

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alleged that it is fraudulent and void on its face. This is merely raising a question of law; the legal conclusion at which the pleader has arrived upon the facts before stated. I do not see how it can be made more definite or certain without requiring him to state the points, arguments, and authorities upon which he expects to maintain this allegation, and this surely is not required by the Code.

The other portion of the complaint which defendants ask to have amended, is the charge immediately following the allegation that the assignment is fraudulent on its face—that it was made with intent to hinder, delay, and defraud creditors; and, in my opinion, the observations in relation to the preceding allegation apply with equal force to this charge. With what effect the assignment was made is certainly a question of fact, to be sustained only by proof of other facts so stated in the complaint, as to authorize proof in relation to them. By what amendment this charge of intent can be made more definite or certain, I cannot see. Whether or not the facts, by proof of which the plaintiff expects to substantiate it, are sufficiently stated, is not now before me. The intent itself appears to me to be stated with all the certainty and definiteness of which it is susceptible.

Motion denied, with \$10 costs.

HICKS *v.* BRENNAN.

Supreme Court, First District; At Chambers, May, 1860.

DISMISSAL OF COMPLAINT.

After an order dismissing plaintiffs' complaint with costs to defendants, although defendants cannot enter judgment for default in payment of the costs, they are entitled to leave to enter it on motion for that purpose.

Motion for leave to enter judgment.

BONNEY, J.—This cause being at issue and on the calendar, was on plaintiffs' motion put off for December term, on pay-

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ment of costs, which were not paid. It was then noticed by both parties for January term. On December 31st, plaintiffs' attorney entered an order or judgment, entitled in the action, in the following words: "On motion of I. T. Williams, attorney for plaintiffs, ordered that the complaint in this action be, and the same is hereby dismissed, with costs to the defendants, to be adjusted;" and afterwards served a copy properly certified by the clerk, on defendants' attorney.

Thereupon the defendants, without further order or direction of the court, had their costs adjusted by the clerk, entered judgment and issued execution.

On affidavits showing such entry of judgment, and alleging various errors in the adjustment of the costs, an order was made setting aside the judgment, and for readjusting the costs as directed in the order.* The costs have been so readjusted, and payment thereof was, on March 6th, demanded. On affidavit that said costs remain unpaid, and noticed, defendants now move for leave to enter judgment that the complaint be dismissed, and for their costs as last adjusted, with the costs of the motion. The plaintiffs insist that defendants must again notice the cause for trial, and if plaintiffs do not appear when the cause is regularly called on the calendar, take judgment by default.

I can see no necessity or reason for the delay and expense of such a proceeding, except to vex the defendants. The plaintiffs have expressed in writing, and made part of the record, their consent and desire that the complaint be dismissed with costs to the defendants; and the defendants ask the benefit of such consent, and that judgment be entered accordingly. In my opinion they are entitled to such judgment, and the motion is granted, with ten dollars costs.

* The decision is reported, *Ante*, 304.

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GLENTON *a.* CLOVER.*Supreme Court, First District; At Chambers, May, 1860.*

NE EXEAT.—MOTION TO DISCHARGE.

A writ of *ne exeat* allowed under the Code.

A denial of any intention of leaving the State is not of itself a sufficient ground for discharging a writ of *ne exeat*.

In an action in which a receiver had been appointed, the court granted a motion to discharge defendant from imprisonment conditionally upon his delivering the property in suit to the receiver.

Motion to discharge *ne exeat*.

BONNEY, J.—The defendant, Clover, moves the discharge of a writ of *ne exeat*, issued in this action, under which he is held in close confinement, for want of bail required in five thousand dollars. The papers show that the above defendants, Clover and Glenton, acting as executors of an instrument purporting to be the will of Jonas W. Glenton (the father of plaintiff), made in Nicaragua, have received a large amount of money belonging to the estate of said testator, of which the plaintiff is entitled to have not less than four or five thousand dollars paid to her, or applied, invested, or secured for her use.

The *ne exeat* was granted on the allegation that defendant was about to leave this State for Nicaragua, where said Glenton has also gone, and that if he did so leave, the plaintiff would lose the amount to which she is entitled, and evidence was given tending to prove such allegation. I think the writ was properly issued upon papers sufficient to allow it.

On this motion to discharge the *ne exeat*, the defendant has read affidavits in relation to the estate of said testator, by which he claims to have shown that all the money realized by said executors is accounted for, and that no part of it has been misapplied; and, also, that when this suit was commenced, he had no intention of leaving this State immediately; that his proposed going to Nicaragua was with reference to business of the estate,

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and that the plaintiff was informed of his intentions, and assented thereto; and he further alleges that, from the action of the plaintiff, he has given up all intention whatever of going to Nicaragua or elsewhere, and has no intention of departing from the jurisdiction of this court.

There can be no doubt, on the papers before me, that plaintiff is entitled to relief in this action. The purpose for which a *ne exeat* is issued is to secure the presence of the defendant within the jurisdiction of the court, to answer the judgment that may be rendered; and for sufficient cause shown, this writ was issued. The defendant, as I understand his affidavit, does not deny that he did intend to go to Nicaragua, but attempts to show that he was not about to leave this State immediately, when he was arrested, and alleges that he has now given up all intention of going. He does not, by stating any facts in relation to himself, his family, business, or property, show that he cannot at any time leave this State, and remove all his property, and he may at any moment resume his intention to go to Nicaragua; and should he do so, and carry such intent into execution, the plaintiff, so far as appears, would be remediless. He has not yet answered the complaint, and I do not think sufficient cause is shown for discharging the *ne exeat*, nor does the amount of bail required appear to be exorbitant.

It is certainly very desirable that the defendant should be released from imprisonment. He states that he is confined for want of bail, but does not state that he is unable to furnish bail. A receiver has been appointed in the action, and if the property in question, and claimed, be passed to that receiver, the defendant may be discharged. A full answer may, perhaps, present a case which will entitle him to relief, but in the papers now before me I do not find such case.

The order to show cause is vacated, and defendant's motion to discharge the *ne exeat* is denied, with \$10 costs, with leave to renew, as he may be advised.

KISSAM *a.* MARSHALL.*Supreme Court, First District; Special Term, May, 1860.*

UNDERTAKING ON ATTACHMENT.—WARRANT.—AMENDMENT.

The warrant of attachment issued under the Code as a provisional remedy, may be allowed to be amended by supplying the omission of the signature of the attorney.

An undertaking given on the issuing of such a warrant, which is insufficient in amount, may be allowed to be amended by filing a new undertaking.

Such amendments may be allowed on the hearing of a motion to vacate the attachment, on the ground of these defects.

Motion to vacate attachment.

LEONARD, J.—The defendant moves to vacate an attachment granted against him as a non-resident debtor, for irregularity.

Several objections are alleged, but only two are entitled to any consideration :

1. The warrant has not been signed by the attorney.
2. The undertaking therefor is in the sum of \$200 when section 230 of the Code requires an undertaking in at least \$250, before the warrant shall issue.

The first defect is clearly amendable.* The second one is of a more serious character.

On first impression, it seemed a fatal failure to give jurisdiction to the court.

There are, however, several adjudged cases where amendments have been allowed, under circumstances equally affecting the jurisdiction.

Section 182 provides that an undertaking in a sum not less than \$100, shall be given before an order shall be granted. In *Bellinger a. Gardner* (12 *How. Pr. R.*, 381), the court permitted such an undertaking to be amended.

An appeal under section 334, is not effectual for any purpose, unless an undertaking in at least \$250 shall be filed.

* Compare Rule 10; and *Yorks a. Peck* (17 *How. Pr. R.*, 192).

There are several cases where such undertakings have been amended by the permission of the court. (*Wilson v. Allen*, 3 *How. Pr. R.*, 369; *Schermerhorn v. Anderson*, 1 *Comst.*, 430; *Beach v. Southworth*, 6 *Barb.*, *S. C. R.*, 173.) These cases are entirely analogous in principle.*

The terms of section 173, permitting amendments in furtherance of justice, are very broad, extending to the correction of a mistake, in any respect, in the pleadings, process, or proceedings of an action.

* The following cases further illustrate this subject :

On an appeal from a judgment, the appellant omitted to file and serve affidavits of the sureties, as required by section 341 of the Code, and the court, on motion, under section 327, permitted the affidavits to be filed and served *nunc pro tunc*. (*Rich v. Beekman*, 2 *Code R.*, 63.)

Section 149 of the Code (1848), allowing amendments of pleadings and proceedings, does not authorize the court to amend an undertaking, on an appeal, by inserting an agreement to pay costs, without the consent of the sureties. (*Langley v. Warner*, 1 *N. Y. (1 Comst.)*, 606.)

Where timely notice of appeal is given in good faith, but the undertaking filed is irregular, the court may permit an undertaking to be filed *nunc pro tunc*. The application to permit it to be so filed, is addressed to the discretion of the court. *So held*, where the undertaking was regular in form, and the imperfection was in the form of the justification alone. (*Supreme Ct., Sp. T.*, 1854, *Mills v. Thursby*, No. 8, 11 *How. Pr. R.*, 129.)

Where the condition of an order granting an appeal, was that the undertaking should be to pay costs of appeal, not exceeding \$250, and all damages which shall be awarded against the appellant upon the appeal, not exceeding \$175,—the sureties in the undertaking justified in double the sum of \$250, and in more than double the actual costs, but not double the \$175.

Held, that though the affidavit was technically insufficient, leave should be given to amend. (*People on rel. Boylston v. Tarbell*, 17 *How. Pr. R.*, 120.)

See also *Spalding v. Spalding* (3 *How. Pr. R.*, 297); and *Furman v. Walter* (13 *Ib.*, 348), which were cases of amendment of *affidavits* on which provisional remedies had been granted.

The Revised Statutes contain a special provision for permitting amendments of bonds required by law. (2 *Rev. Stat.*, 556, § 34.) The cases which have arisen under that statute are as follows:—*Potter v. Baker* (4 *Paige*, 290); *Van Slyke v. Schmeck* (10 *Ib.*, 301); *Whaling v. Shales* (20 *Wend.*, 673); *Cutler v. Rathbone* (1 *Hill*, 204); *Hawley v. Bates* (19 *Wend.*, 632); *Newland v. Willetts* (1 *Barb.*, 20); *Crogran v. Livingston* (6 *Ante*, 350; affirming *S. C.*, 25 *Barb.*, 336); *Warring v. Warring* (7 *Ante*, 472); see also *Ex-parte Chryslin* (4 *Cow.*, 80); *Eldridge v. Howell* (4 *Paige*, 457).

As to whether an undertaking, under the Code, is to be deemed a bond, within the meaning of the Revised Statutes, compare *Langley v. Warner* (1 *N. Y. (1 Comst.)*, 606); *Wilson v. Allen* (3 *How. Pr. R.*, 369); *Beach v. Southworth* (6 *Barb.*, 173).

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No wrong is done by putting a party in a condition to enforce or defend his rights in relation to matters of form merely, if the amendment be applied for in due season.

The plaintiff must be permitted to amend the attachment by affixing thereto the name of his attorney, and also to file a new undertaking in \$1000, in due form, to be approved by a justice of this court, and pay \$10 costs of this motion to the defendant's attorney in three days; and on compliance with these terms, the motion is denied.

*Extra, 15 Nov.
410 i 17 8d. 1571
18 8d. 33.*

SPERLING *a.* LEVY.

New York Common Pleas; General Term, May, 1860.

SUPPLEMENTARY PROCEEDINGS.—RETURN OF EXECUTION.

An execution may be returned at any time after it is issued, and supplementary proceedings may be taken immediately thereon; and it is immaterial that the return was made before the expiration of sixty days, at the creditor's request. The court will not go behind the return, except on a direct motion to set it aside.*

Appeal from an order refusing to set aside supplementary proceedings.

The facts are stated in the opinion.

BY THE COURT.—HILTON, J.—To entitle a party to the examination of a judgment-debtor under the first subdivision of section 292 of the Code, it is only necessary for him to show that an execution has been issued upon the judgment, against the debtor's property, and returned unsatisfied in whole or in part. In the language of that section, the judgment-creditor at any

* Compare in addition to the cases cited in the opinions, *Spencer a. Cuyler* (9 *Ante*, 382); *Farquaharson a. Kimball* (*Ib.*, 385, *note*); *Owen a. Dupignac* (*Ib.*, 180).

time after such return is made, is entitled to an order from a judge of the court requiring such judgment-debtor to appear and answer concerning his property.

By (2 *Rev. Stat.*, 440, § 77), it is provided that every sheriff, or other officer to whom any process shall be delivered, shall execute the same according to the command thereof, and shall make due return of his proceedings thereon, which return shall be signed by him. For any violation of this provision, such sheriff or other officer shall be liable to an action at the suit of the party aggrieved, for the damages sustained by him, in addition to any other fine, punishment, or proceeding which may be authorized by law. (See 3 *Rev. Stat.*, 5th ed., 739, § 98.) And it has long been settled that the sheriff's return is evidence that he has done those official acts which are required by the execution to be performed. (*Browning a. Hanford*, 5 *Den.*, 586, 598.)

Thus in *Putnam a. Mann* (3 *Wend.*, 202), it was held that a return of a constable upon a summons, of its personal service, is conclusive against the defendant in the cause in which it is made. Its truth cannot be traversed by plea in abatement or otherwise, but if it be false, the defendant's remedy is in an action against the constable for a false return. (1 *Cowen's Pr.*, 3d ed., 555; *Wheeler a. Lampman*, 14 *Johns.*, 481; *Crocker on Sheriffs*, § 44, or by a *direct* proceeding to vacate it; *Allen a. Martin*, 10 *Wend.*, 301.)

This being the settled law in respect to an official return of the sheriff upon process by which the party is brought into court, and on which the court may proceed to give judgment against him even though the return may be false, there seems an obvious propriety in applying the same rules of law to his official acts in regard to the return of an execution, issued to enforce a judgment in an action where it is not pretended that any irregularity or fraud was practised in obtaining the judgment. And whether the act was performed at the request of the plaintiff, or whether it was done within the time permitted him by law to make his return, is, I think, entirely immaterial; it is sufficient upon supplementary proceedings, under the section of the Code referred to, that an execution has been returned unsatisfied, as, upon that fact being shown to exist, the law declares that the judgment-creditor *is entitled* to an order requiring the debtor to appear

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and be examined. It does not say that the order shall not be granted when the return has been procured upon the request of the creditor, nor does it require the execution to remain any specified time in the hands of the sheriff, before a return can be made upon which such proceedings may be instituted; it simply requires as a condition precedent to the granting of the order, that the execution shall have been returned unsatisfied in whole or in part.

Nor can it be said that the intention was not to permit the defendant to be examined in these proceedings until after the plaintiff has exhausted his remedy upon the execution, because in the second subdivision of the same section, his examination may be had before its return, where it appears to the satisfaction of the judge that the defendant has property, which he unjustly refuses to apply to the satisfaction of the judgment upon which the execution has been issued. And, therefore, the practice of the late Court of Chancery in respect to creditor-bills, and for which these proceedings are a substitute to a certain extent, has not, in my opinion, any applicability for the purpose of determining whether a party shall have an order which the law in express terms declares him entitled to. (*Livingston a. Cleveland*, 5 *How. Pr. R.*, 396.)

To refuse it because he has *requested* the sheriff to return the execution, or because that officer has failed to perform the duty imposed upon him by statute, while at the same time the official return is allowed to remain upon the files of the court, not vacated or discharged in any manner, or its character as an official act not lessened or impeached, is, in my opinion, assuming a power which the law does not confer upon us either as judges or as a court.

If the return is false, upon a direct motion for the purpose, let it be vacated; but while it stands in full force and validity, it should be regarded to the extent which the Legislature has declared: as a fact existing, entitling the creditor to an order requiring the debtor to appear and be examined concerning his property.

The law provides ample redress in case a judgment-debtor is imprisoned by a false return; and I am unwilling to so construe a plain enactment as will result in interposing any obstacle to a creditor seeking to collect a debt which, by the judgment of the

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court, has been declared to be a just obligation ; and especially am I unwilling where such a construction seems to me to require the interpolation in a statute of language at variance with its plain import and intention.

Entertaining these views, I am of opinion that in these proceedings we cannot go behind the sheriff's return upon the execution, and until that is vacated or set aside, the judgment-creditor is in all cases entitled to the order for the debtor's examination.

I have not deemed it necessary to refer to or comment upon the different views upon the question here discussed, and which have been stated in several reported cases ; considering them as opinions of learned judges, entitled to great respect, but not of binding authority upon this court in determining the intent of the Legislature in enacting a law, the language of which appears to my mind so clear and explicit as to need no inquiry into the intention of the law-makers, except so far as it is expressed in the words employed by them. (*Sedg. on Const. Law*, 231, and cases cited ; *United States a. Fisher*, 2 *Cranch*, 358.)

“ When a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.”

In my opinion the order appealed from should be affirmed.

DALY, F. J.—I agree that the mere fact that the execution was returned at the plaintiff's request before the expiration of the sixty days, is not in itself a sufficient reason for setting aside the supplementary proceedings. It is not inferable from that fact alone, that the return was obtained for the purpose of creating costs, or that it was done from any improper motives. I therefore concur in the conclusion of Judge Hilton affirming the order at special term.

BRADY, J. (dissenting.—After discussing another objection) I think that the order supplementary should have been discharged. The execution was returned, long before the expiration of the sixty days, at the request, direction, and demand of the plaintiff. The mere fact that the execution was returned within the sixty days would amount to nothing (*Livingston a. Cleveland*,

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5 *How. Pr. R.*, 396), because, as stated by MASON,* P. J., "It follows, that as we are to presume that the sheriff has done his duty in searching for property, when he has made his return of *nulla bona*, that we must regard the legal remedies of the plaintiff as exhausted, before these proceedings supplementary to the execution were instituted." Where, however, the execution is returned at the request of the creditor, no such presumption can be entertained. It is not the return of the sheriff, predicated of official action, and he assumes no responsibility in regard to it. It is the act of the creditor in fact, and a mere formula to enable him to adopt proceedings for which, it might be, there was no necessity. The Legislature never intended to subject the debtor to the expense of proceedings supplementary at the instance of the creditor, but to provide against the concealment of property, or against the enjoyment of property which official vigilance could not discover. The Supreme Court of this district (*Pudney a. Griffiths*, 6 *Abbotts' Pr. R.*, 211; S. C., 15 *How. Pr. R.*, 410), and the Superior Court of this city, have held that orders obtained in the manner stated, should be discharged. (*James a. Nagle*, 7 *Abbotts' Pr. R.*, 234.) It did not appear in either of the cases cited, that the creditor knew of property owned by the judgment-debtor, and available under execution. In this case, that fact is shown by the defendant's affidavits. I think the order, on principle and on authority, should have been discharged, and that the order made at special term should be reversed.

Order affirmed.

MAHONEY *a.* GUNTER.

New York Common Pleas; General Term, May, 1860.

JURISDICTION OF MARINE AND JUSTICES' COURTS.—WAIVER OF
WANT OF JURISDICTION. — EVIDENCE. — DECREE OF SUR-
ROGATE.

Whether an action on the official bond of an executor or administrator is an action against the executor or administrator as such, within section 54 of the Code, excluding justices' courts from cognizance of such actions,—*Query?*

An order of another court cannot be proved by a copy of the record, even though signed by the judge and attested by his seal, unless it is proved or certified to be an examined copy. Per HILTON, J.

A complaint on the bond of an executor or administrator which does not show unconditionally that the surrogate had jurisdiction to issue letters on the decedent's estate, is insufficient. Per BRADY, J.

The surrogate has not power, on application made before final accounting, to direct payment of a debt out of the order of preference prescribed by the statute, unless proof is made that the debt is due. Per BRADY, J.

Appeal from a judgment of the New York Marine Court.

The facts are fully stated in the opinions.

HILTON, J.—Whether the Marine Court has jurisdiction of an action of this nature, must be determined by reference to sections 53 and 54 of the Code, which by section 65, are made applicable to that court.

The bond which formed the subject of the action, was made by the defendant Gunter, and her sureties the defendants Sherman and Savery, upon her appointment by the surrogate of the county of Queens, as administratrix of the goods, chattels, &c., of Harman H. Gunter, deceased, and was conditioned that she should faithfully execute the trust reposed in her as such administratrix, and obey all orders of the surrogate of said county, touching the administration of the estate so committed to her. The breach alleged, was that she neglected to pay to Feely and McLaughlin, the assignees of the plaintiff, the amount of a debt

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ascertained and determined by such surrogate to be due from the estate of the intestate, and ordered by him to be paid therefrom by the defendant Gunter as such administratrix. It was clearly, therefore, an action against the administratrix and her sureties, upon a bond to recover damages sustained by reason of a breach of her official duty, in not obeying an order made by the surrogate, requiring her to pay out of the estate a debt ascertained by him to be due and owing to a creditor of the intestate; and the bond having been assigned by a further order of the surrogate, for the purpose of being prosecuted, the extent of the recovery in the action brought upon it, would be the sum thus ordered to be paid.

By subdivisions 5 and 6 of section 53 referred to, the jurisdiction of the Marine Court is limited to actions upon bonds conditioned for the payment of money, and upon surety bonds taken in that court. And by subdivision 5 of section 54, it is expressly declared to have no jurisdiction of an action against an executor or administrator as such. So that whether we regard the bond here sued upon, as conditioned for the performance of an official duty, and not in terms for the payment of money; or whether the nature of the liability of the defendant Gunter, which is sought to be enforced, is alone considered, the language of the Code is sufficiently comprehensive and explicit to cover this case in either aspect, and deprive the Marine Court of jurisdiction.

The case of *O'Neil v. Martin* (1 *E. D. Smith*, 404), is, I am aware, relied on as sustaining a contrary view. But there, it will be seen upon examination, this question was not presented for determination by the court; and although, in the opinions delivered, it was alluded to, yet it was evidently but an impression stated as *obiter*, and should not, therefore, be considered as controlling upon us.

In that case it appeared, that an action had been brought in a district court against the defendant, a specific judgment recovered, and a transcript filed with the county clerk; upon which execution having been issued and returned unsatisfied, proceedings supplementary were instituted before a judge of this court at chambers, and subsequently, on the defendant's application, dismissed, upon it appearing that the action was brought upon the usual administrator's bond, as in this case; the judge hold-

ing that a justice's court had no jurisdiction of such an action. The general term, upon appeal, reversed this decision, on the ground that it was erroneous for the judge, in a proceeding supplementary to execution, to review the merits of the original action, and thus determine whether the court that gave the judgment, acquired or had jurisdiction of the matter in controversy; and added, that if the defendants objected to the validity of the judgment, they should have appealed; but by not doing so they submitted to it.

To this extent, the decision is not only to be followed, but meets our approval, indeed, it commends itself;—but obviously, after having determined that the judge at chambers could not go behind the transcript of the judgment, and look into the proceedings of the justice, to ascertain whether he had jurisdiction, the general term upon appeal was equally precluded.

It may be remarked, that here, the objection to the jurisdiction of the Marine Court was not presented until after the defendants had put in their answer, and the cause had been set down for trial; and as it was matter in abatement of the action, it is insisted that it was waived by pleading to the merits, and the parties should be considered as so intending. That the general effect of pleading in bar is to waive all matter in abatement of the action, cannot be disputed (*Gosling a. Broach*, 1 *Hilt. R.*, 49); but the waiver must be understood as only applying to such matters as it is competent for the party to waive or assent to. The jurisdiction, however, of a tribunal is not a thing of such a nature as can be conferred at the option of a party, where the law has unqualifiedly withheld it (*Coffin a. Tracy* 3 *Cal.*, 129; *Beach a. Nixon*, 5 *Seld.*, 35); and the Marine Court being strictly confined to the authority which these statutes have given it, can take nothing by implication, although parties to actions in it may by consent take away error in its proceedings and judgments. (*Dudley a. Mayhew*, 3 *Comst.*, 9; *Striker a. Mott*, 6 *Wend.*, 465.) And it seems if it should act without jurisdiction, though the judgment would be void, yet the party against whom it was given, if he would prevent its being carried into effect by execution against him, must seek his remedy by procuring a reversal upon appeal. (*Cuyler a. Trustees of Rochester*, 12 *Wend.*, 165; *Starr a. Same*, 6 *Ib.*, 564; *Blin a. Campbell*, 14 *Johns.*, 432.)

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Being of opinion, for the reasons stated, that the judgment should be reversed, it is quite unnecessary to examine the other questions presented. But as a manifest error was committed at the trial, in admitting as evidence a paper purporting to be a copy of the order of the surrogate, directing the administratrix to pay the debt held by the plaintiff, without any proof whatever in respect to it, I will content myself with briefly alluding to the subject, with the remark that the paper referred to was a copy of an entry or record made in the Surrogate's Court in the course of a judicial proceeding, and might have been proven in three ways ;

1. By the production of the original record.
2. By proving the paper produced to be an examined copy, or
3. By attaching to it the certificate of the surrogate, attested by his official seal, showing that the same had been compared by him with the original, and that it was a correct transcript therefrom, and of the whole thereof. (3 *Rev. Stat.*, 404, § 59, 4th ed., vol. ii., p. 649.) The plaintiff did neither, but merely produced a paper signed by the surrogate, and attested by his official seal, without any certificate being attached as the statute requires. The defendants objected to the admission of such a document in evidence ; but the objection was overruled by the court, and they excepted.

This was clearly erroneous, and would be sufficient alone to call for a reversal of a judgment founded on such evidence.

BRADY, J.—Harman H. Gunter died intestate, in the county of Queens, in this State. Adeline C. Gunter applied to the surrogate of that county for letters of administration upon the goods, and chattels, and credits, which were of the said Harman ; and on or about the 3d day of July, 1857, they were issued to her. The defendants Sherman and Savery, pursuant to the statute, united with her in the execution and delivery of a joint and several bond in the sum of \$500, the condition of which was that if the said Adeline faithfully executed the trust reposed in her as administratrix of the said goods, and chattels, and credits of the said Harman, and obeyed all orders of the surrogate of the county of Queens, touching the administration of the said estate, then the obligation should be void ; otherwise, to remain

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in full force and virtue. After the expiration of six months from the granting of such letters of administration, the said Adeline was cited to appear, on the 8th day of March, at 11 A. M., before the said surrogate, to show cause why he should not decree payment against her of the debts or claims of Mary Feely, Margaret Mahoney, and Sarah McLaughlin, for services rendered to the intestate. On the day named in the citation, no one appearing to oppose, it was ordered and decreed by the surrogate that the said Adeline pay to the said Mary Feely, \$111.20; to the said Margaret Mahoney, \$89.42; and to the said Sarah McLaughlin, \$82; and subsequently, on the 14th of August, 1858, the said surrogate, on the application of the said claimants, the said order or decree not having been obeyed, ordered that the bond given, as before stated, be assigned to them for the purpose of being prosecuted. On the 17th of August, 1858, Sarah McLaughlin and Mary Feely assigned their respective claims to the plaintiff, and in October, 1858, the plaintiff commenced this action to recover the sums which the said surrogate ordered Adeline to pay by the decree of the 8th of March. The facts thus stated were alleged in the complaint, and the defendants Sherman and Savery, answered by denying all the allegations of the complaint, except that the intestate died in the county of Queens, and the execution of the bond by them, and averred:

1. That Adeline had not neglected to pay the sums of money mentioned in the complaint, or either of them, or failed to execute the trust reposed in her, or to obey any legal order of the surrogate touching the estate committed to her.

2. That she had not filed an inventory, and that eighteen months had not elapsed since the granting of letters of administration to her.

3. That no assets ever came to her possession, and

4. That divers judgments against the intestate existed, which were liens against any estate he might have left, and which were entitled to a preference over the pretended claims of the plaintiff.

No objection was taken that the plaintiff had prosecuted the action in her own name, either by answer or demurrer, or upon the trial, and the defendants offered no evidence on their part. They now object to the judgment, however, on the ground that

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the action should have been brought in the name of The People of the State of New York ; but the objection is too late, even if valid. (*Code*, §§ 144, 148 ; The People *ex rel.* Demarest *a.* Laws, 3 *Abbotts' Pr. R.*, 450 ; Baggott *a.* Boulger, 2 *Duer*, 160.)

When the cause was brought on, and before any testimony was given, it was insisted by the defendants that the Marine Court had no jurisdiction over the subject-matter of the action, and that the complaint did not contain facts sufficient to constitute a cause of action. As to the first of these objections, we have held that an action against the obligors of a bond, such as the one prosecuted herein, is an action against the administrator personally, and not against him as administrator within the provisions of section 54 of the Code. (*O'Neil a. Martin*, 1 *E. D. Smith*, 404.) And if the action can be prosecuted in the Marine Court against the administratrix, there can be no doubt that it may be against her sureties. They are not favored by section 54, above referred to. The last objection stated was for this reason, not well taken. But if the objection to the jurisdiction had been good, it was waived by pleading to the merits. (*Gosling a. Broach*, 1 *Hilt. R.*, 49.)

The second objection was, however, well taken. The complaint alleges that Harman H. Gunter died intestate in the county of Queens, and State of New York, or at the time of his death had personal property in said county, and that letters of administration were granted to the defendant Adeline. The power of the surrogate is limited. He shall have sole and exclusive power within the county for which he may be appointed, to grant letters of administration of the goods, chattels, and credits of persons dying intestate, where the intestate at or immediately previous to his death *was an inhabitant* of the county of such surrogate, in whatever place such death may have happened ; and where an intestate not being an inhabitant of this State shall die in the county of such surrogate, leaving assets therein ; and in other cases not necessary to be stated for the purposes of this appeal. The pleader seems to have had these powers in his mind when the complaint was drawn, and seems also to have intended to state that under each, the surrogate had authority to grant letters of administration. He did not, however, state a proper subject within either. He has not alleged that the intestate was an inhabitant of the county of Queens, at or imme-

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diately previous to his decease, or that not not being an inhabitant of this State, he died in that county leaving assets therein. Although the intestate died in the county of Queens as alleged, the surrogate would have no power to issue letters of administration of his goods, unless he were an inhabitant of, or not being a resident of the State, left assets in that county; and it cannot be disputed that the facts set out did not show the authority of the surrogate to grant the letters issued. That was necessary. The Surrogate's Court is a creature of the statute; and being a court of inferior and limited jurisdiction, those claiming under its decree must show affirmatively that the surrogate had authority to make the decree, and that the facts upon which he acted gave him jurisdiction. (*Dakin a. Hudson*, 6 *Cow.*, 221; *Bloom et al. a. Burdick*, 1 *Hill*, 130, 134; *Cornell a. Barnes*, 7 *Hill*, 35, *note e*; *The People a. Kœber*, *Id.*, 40; *Sharp et al. a. Spier*, 4 *Hill*, 76; *Corwin a. Merritt*, 3 *Barb.*, 341; *Bugbee a. Surrogate of Yates*, 2 *Cow.*, 471.)

The facts did not, therefore, constitute a cause of action, because it did not appear from those facts that the surrogate had jurisdiction over the goods, chattels, and credits which were of Harman H. Gunter, deceased. It is no answer to this view, that the defendant Gunter having applied for letters, the defendants, her sureties, are estopped from questioning the power of the surrogate, inasmuch as consent could not confer jurisdiction, and without jurisdiction the bond taken by him would be void. (*Dole, administrator a. Irish*, 2 *Barb.*, 639.) There is still another fatal objection to the judgment rendered in the court below. The plaintiff, to maintain the issues on her part, gave in evidence a copy of decree of the surrogate, ordering the payment of the claims of the plaintiff, and those assigned to her. On examination of that decree, it will be seen that it was entered upon filing proof of the service of the citation to appear before the surrogate and show cause, and without any proof of any other fact. It does not appear that the claims for services rendered the intestate were proved, or that having been proved, there was proof of assets sufficient to justify the payment of those claims prior to the time allowed for a final accounting. It is true that the statute empowers the surrogate to decree the payments of debts after the expiration of six months from the time of granting letters of administration (2 *Rev. Stat.* 116, § 18,

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4th ed., 300; Fitzpatrick *a. Brady*, 6 *Hill*, 581);—and that this power is discretionary, see Campbell *a. Bruen* (1 *Bradf. R.*, 229), although the propriety of exercise is questioned (*Willard on Ex.*, 302, 303);—but it was not intended by the Legislature that the surrogate upon the mere service of a citation to appear, should decree the payment of the claim urged. The statute had provided that certain debts should have a preference over simple demands, and should be paid in the order of their classes, viz.:

1. Debts entitled to a preference under the laws of the United States.

2. Taxes assessed upon the estate of the deceased previous to his death.

3. Judgments docketed, and decrees enrolled against the deceased, according the priority thereof respectively.

4. All recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts (2 *Rev. Stat.*, 87, § 27; 4th ed., 273, § 31);—and further, that in an action against an executor or administrator, he could set up as a defence that there were unpaid debts of a prior class unsatisfied. (2 *Rev. Stat.*, 88, § 31; 4th ed., 273, § 35.) If the surrogate is not required by law to ascertain whether the assets are sufficient to justify him in decreeing a payment of a debt in the fourth class, there can be no doubt that when his decree directs the payment of a debt out of its order, or prior to the final distribution, it must at least appear that the debt is due. There is no evidence in this case that any such proof was given to him, nor is there proof in the case that the claims directed to be paid were ever in fact due from the intestate. The proof does not, therefore, show, in the language of the cases *supra*, affirmatively that the surrogate had authority to make the decree upon which this action is based, and that the facts upon which he acted gave him jurisdiction.

The judgment should be reversed.

DALY, F. J.—I concur in reversing this judgment, without expressing any opinion upon the point upon which Judges Brady and Hilton have differed.

Judgment reversed.

Halbeck *a.* The Mayor, &c., of New York.

HALBECK *a.* THE MAYOR, &c., OF NEW YORK.*New York Common Pleas; General Term, December, 1859.*

OFFICER.—ACTION FOR SALARY.—EVIDENCE.

What is sufficient evidence that an officer has taken his oath of office ?
In an action to recover an officer's salary, where it is not shown that he rendered any services, but his readiness to do so if he had been required is relied on, it is necessary to prove that he was duly qualified.*

Appeal from a judgment.

BRADY, J.—Edwin Bouton, the plaintiff's assignor, was appointed clerk of the First District Police Court, on the 31st December, 1857, by the Mayor, Aldermen, and Commonalty of this city, under and by virtue of an act of the Legislature, passed April 10, 1855 (*Session Laws*, 502). Prior to his appointment, and on the 15th April, 1857, the Legislature passed the act to establish a Metropolitan Police District, and to provide for the government thereof, and by section 29 of that act conferred upon a Board of Police the power of appointment of all clerks to the judicial districts in which police-justices were elected, and declared it to be their duty to designate the court at which such clerks should do duty. Bouton having thus been appointed, commenced his duties as he states on the 3d January, 1858, and did every thing, and performed every duty that he was asked to do or perform by the justice of the court holding the same. Whether he was ever asked to do any thing in fact, or whether he ever did any thing in fact as a police-clerk, does not distinctly appear from the evidence contained in the return. The action is brought to recover for two months' salary, at the rate of \$1250 per annum; and Bouton having assigned the claim, appeared as witness for the plaintiff. The defendants set up as a defence that they had no power to appoint Bouton, such power residing

* Compare *People on rel. Morton a. Tieman* (8 *Ante*, 359).

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only in the Board of Police already mentioned; and on the trial they insisted that Bouton having failed to prove that he had taken the oath of office, the plaintiff could not recover. Bouton stated that he had taken the oath of office, and that a memorandum in writing at the foot of the certificate of his appointment, signed by the secretary of the meeting of the Mayor and Aldermen, at which the appointment was made, was in the handwriting of Fernando Wood, mayor of New York. The memorandum was as follows: "Sworn before me this 31st day of December, 1857, Fernando Wood, Mayor." The testimony thus given, was objected to by the defendants, upon the ground that it was not "sufficient or proper to prove the fact that the plaintiff had taken the oath of office," and "that the paper did not on its face purport to be an oath of office."

Every person who shall be elected or appointed to any civil office or public trust embraced in this chapter, before he shall enter on the duties of such office or trust, shall take the following oath: "I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of — according to my best ability." (1 *Rev. Stat.*, 114, § 20, 5th ed., 410, § 24.)

By the following section it is proved that such oath, when a different time shall not be prescribed by law, shall be taken and subscribed within fifteen days after the officer shall be notified of his election or appointment, or within fifteen days after the commencement of his term of office.

The chapter referred to is chapter 5, of part 1 of the Revised Statutes, and is, Of public officers in this State, other than militia or town officers; their election or appointment; their qualifications and the tenure of their offices (1 *Rev. Stat.*, vol. i., 95, 5th ed., 378); and embraces the clerks of the Police Courts. Every such oath duly certified by the officer before whom the same was taken, shall be deposited, if taken by an officer elected or appointed for any county or city, in the office of the clerk of the county in which he resides. (1 *Rev. Stat.*, 129, § 24, 5th ed., 411, § 29.) And every office shall become vacant upon the refusal or neglect of the officer to take the oaths of office within the time required by law. (1 *Rev. Stat.* 122, § 34, 6th ed., 413, § 40.)

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The statute contemplates and requires that the oath shall be in writing, and taken and subscribed by the officer, and filed in the office of the clerk of the county, or other place designated by the statute, and imposes as a penalty, either for refusal or neglect to comply with that requirement, the vacating of the election or appointment. The proof offered by the plaintiff was wholly insufficient. It does not appear to what Bouton swore; whether he took the oath of office required by the statute or not; and it is evident that he did not take and subscribe that oath, as required by law. He was, it appears, notified of his appointment on the 31st December, 1857, and on that day took some oath, but what, does not appear. Having omitted to prove that he took the oath of office, mentioned *supra*, within the fifteen days, and no other time having been prescribed by law, the presumption is that his office became vacant on the 15th of January, 1858; and the plaintiff cannot recover for any period, because the statute is imperative that the officer shall, before he enters upon the duties of his office, take the oath to support the constitution, &c., as in the form prescribed. The plaintiff's assignor had no claim, therefore, against the defendants. He had not qualified himself, and his office became vacant. As between him and the defendants, he must show a clear demand, whatever may be determined as to his acts *inter alias*; and not having done so, his claim falls to the ground. The defendants are not estopped from insisting that he shall show a right to recover. They cannot repeal the statute; and the Legislature having declared the office vacant, Bouton was not entitled to the compensation fixed by statute.

From this view of this appeal, it is not necessary to examine any other question presented.

Boswell *a.* The Hudson River Railroad Company.

BOSWELL *a.* THE HUDSON RIVER RAILROAD COMPANY.*New York Superior Court; General Term, April, 1860.*

CAUSE OF ACTION.—CARRIER'S CONTRACT FOR RESTRICTED LIABILITY.—ANSWER.

Of the power of carriers of passengers to restrict their liability by a contract.
Form of a sufficient answer setting up such contract.

Appeal from an order made at special term, sustaining a demurrer to the defendants' answer, and that the plaintiff have judgment against the defendants thereon, with costs, with leave to amend such answer.

The action was brought by plaintiff as administrator of a deceased person. The complaint stated that the deceased was a passenger in a car of the defendants, to be carried from East Albany to the city of New York, for a certain reasonable reward. That the defendants undertook to carry him safely; but that they did not properly manage their road, or properly manage their car, or safely carry or convey him, but said defendants and their agents so negligently and improperly managed and conducted, as that the car in which the deceased was, came in contact with another car or locomotive, and was demolished and thrown from the track of the said defendants' road, and that the deceased was then and there from such gross negligence of the defendants, instantly killed, or received great injury, from which he immediately died. That his death was caused by, and was the result of the gross negligence of the defendants as aforesaid.

The answer was as follows:

The defendants' answer to the complaint of the plaintiff herein:

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They deny the allegations in the second paragraph of the said complaint contained, and each and every of said allegations.

They have no knowledge nor any information sufficient to form a belief in respect to the allegations of the third and fourth paragraphs of the said complaint, and therefore deny the same.

And for a further and separate defence, the defendants further answering, say: that at the time and place in the complaint mentioned, the said John B. Boswell was upon the cars of the defendants, *not as a passenger, nor upon the payment of, or promise to pay, any fare, but under and in virtue of a special contract made between the said Boswell and the said defendants*, which contract was evidenced by the pass or free ticket given to him by the defendants, and accepted and used by him, and by virtue of which he was riding upon the road, and in the cars of the defendants at the time of the *alleged* injury. That the conditions of the said contract by which the defendants agreed to carry the said Boswell, were printed upon the face of the said ticket or pass; and were in the words following: "Conditions. This ticket is issued to the *owner of live stock, or his agent*, to enable *him* to take the entire charge and care of *his stock* while on the Hudson River Railroad, and is part of the contract for transporting the same. By accepting or using it, he expressly releases the company, in consideration of this pass, *and the reduction of price below the tariff rates*, from all liability for injury to said stock from suffocation, crowding, trampling, or delay in transportation, *or for injury to his person or stock, arising from any cause whatsoever.*"

That the said ticket was accepted and used by the said Boswell at the time of the injuries alleged to have been sustained by him, and that the said injuries were not caused by any *fraudulent, wilful, or reckless act, or misconduct, or gross neglect, or default on the part of the defendants*, and that the defendants are not liable therefor.

THOMAS M. NORTH,
Attorney for defendants.

BY THE COURT.—BOSWORTH, Ch. J.—It is insisted by the counsel of the plaintiff, that the court is at liberty to interpret this con-

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tract by the attending circumstances, and to restrict the general language to cases which would still leave the defendants liable for same neglect.

Adopting this view, this at least is clear, that the plaintiff must show plainly, that the intention of the parties was to qualify and restrain the very comprehensive language used in the instrument.

So far from its being obvious, that there are cases other than those of negligence, which the parties may be reasonably supposed to have contemplated, it seems to us difficult to understand, in what cases the company could be rendered liable at all for injury to the person of the party, without some negligence on their part or on the part of their agents. An injury to his person, in the course of his being carried to New York in their cars, may have arisen either from his recklessness, without any fault of the defendants; or from an event wholly independent of fault of either party; or from some neglect or fault on the part of the defendants. The parties cannot be intended to have contemplated the exemption of the defendants in the two first cases. The natural interpretation is, that they meant to cover the last case.

The counsel of the defendants does not deny that there may be a degree of gross neglect, amounting to wilful and fraudulent misconduct for which they might be responsible, even under this contract. His answer is formed to negative such a case.

It may be difficult, or impracticable, as observed in *Weller a.* The New York Central Railroad Company (26 *Barb.*, 646), to distinguish accurately between the different degrees of negligence. Yet one case can certainly be readily supposed in which a marked and practical distinction would exist. There might be a case of such misconduct on the part of an agent, as would indicate a wilful design to injure the party—a desperate recklessness which wantonly endangered the lives or property of all beneath his charge, a case of personal misconduct—and yet the principal who employed him, be responsible. In *Weed a.* The Panama Railroad Company (5 *Duer*, 193; 17 *N. Y. R.*, 362), the wilful act of the conductor who managed the train, was not allowed to be a ground of exemption for the company.

The averments of the answer seem to us to cover all such cases

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as we can imagine of this nature; and the terms and import of the stipulation appear to amount to an agreement, that the party was to have no redress for injuries arising from other degrees or cases of negligence.

We consider also that the parties were fully at liberty to enter into a contract of this nature. (1 *Sherm.*, 1185.)

We think that the court below erred, and that the order must be renewed, and the demurrer overruled.

DURANT *v.* GARDNER.

Supreme Court, First District; Special Term, May, 1860.

PLEADING.—ALTERNATIVE CAUSE OF ACTION.—DEMAND OF RELIEF.

An action against the directors of a corporation, seeking to charge them personally with a debt of the corporation, which as against the corporation rested in contract, is an action on contract.

The complaint in such action is not to be deemed as uniting several causes of action because it sets forth several grounds, on either of which the defendants would be liable.

A demand for judgment in the alternative is improper, and should be stricken out.*

A demand for general relief is inconsistent with a demand for judgment in a specified sum in an action for a money-demand on contract, and should be stricken out.

Motion to compel amendment of the complaint.

This was an action brought by a receiver against several defendants who were trustees of a corporation, seeking to charge them individually with a debt of the corporation.

BONNEY, J.—The summons in this action is for a money-demand on contract.

* Compare *People and Taylor v. Mayor, &c.*, of New York (8 *Ante*, 7); *Van Rensselaer v. Layman* (10 *How. Pr. R.* 505).

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The original complaint stated facts supposed to constitute a cause of action, whether legal or equitable might be doubtful, and prayed judgment that defendants in one event be decreed to account and pay to plaintiff their proportions of certain sums of money claimed to be due; and that plaintiff have judgment against them for \$6958, with interest and costs; and in another event, demanded judgment against the defendants, as trustees, for said sum of money, with interest, and for general relief.

On the 21st of January last, an order was made on defendants' motion, that the complaint be stricken out for irregularity, in that it did not conform to the summons, with leave to plaintiff to serve an amended complaint.

The plaintiff has served an amended complaint, which, or portions of which, the defendants now move to strike out.

The plaintiff in this amended complaint, after stating his appointment as receiver of Downing, &c., alleges that the defendants and Downing undertook to form and act as a manufacturing corporation, under the laws of this State, of which corporation Downing and defendants were named and acted as trustees; that such supposed corporation and trustees neglected to perform certain required acts necessary to the proper formation, or continued legal existence of their incorporation. That for the benefit of the company, and *at request of said trustees*, Downing advanced and paid various sums of money and assumed liabilities, in the aggregate amounting to \$6958, which the company was liable to pay him, and which the defendants, by reason of their neglect of duty as such trustees, became liable to pay; and that the right to such sum and to collect the same has passed to the plaintiff as receiver.

The complaint further alleges that if the intended corporation was not legally formed, the defendants and Downing remained an unincorporated joint-stock company, and as such (in that case, I suppose is intended) the defendants are liable to pay said indebtedness to Downing; and plaintiff prays judgment that in case said corporation be adjudged not to have been legally formed, the defendants be adjudged to pay to plaintiff, and that he have judgment against them for, said \$6958, and interest. But if it be adjudged that said corporation was duly formed, then that plaintiff have judgment for said sum of money and interest,

against the defendants, as trustees, for their alleged defaults, neglects, and omissions of duty.

The conclusions of law upon which the plaintiff demands judgment against the defendants, are somewhat inartificially, and probably unnecessarily, stated in the complaint. It would have been sufficient, and I think better pleading, to have plainly alleged the facts upon which plaintiff relies, and demanded judgment for the amount of money claimed to be recovered; omitting any statement of supposed legal principles upon which he relies to maintain his claim.

But the plaintiff has, I think, intended to allege that upon the facts stated he has a legal claim against the defendants for the money demanded, on an implied contract arising upon alleged irregularities in the supposed formation of the intended corporation, or neglect in the subsequent performance of their duties as trustees of such corporation, by reason of which the defendants, personally, instead of the corporation, have become his debtors for the money by him advanced, &c., which in my opinion is a claim for a money-demand on contract; and if the plaintiff at the trial shall fail to make out a contract, express or implied, he must fail in the action.

I do not think the plaintiff has in this amended complaint stated, or intended to state, two classes or forms of action, or indeed, two counts. He has stated, unnecessarily I think, two supposed legal grounds upon which he seeks to maintain his action; but such statement is *not uniting two inconsistent causes of action or claim* which requires one to be stricken out from the complaint.

The defendants move to strike out three specified sections or portions of the amended complaint. The first-mentioned section is a statement of facts which appears to be unobjectionable, if not absolutely necessary to be stated.

The second section moved to be stricken out, is a demand for judgment upon hypothetical or alternative conclusions of law, at which it is supposed the court may arrive on the trial; and this appears to me not only unnecessary, but improper to be inserted in the complaint.

The third section is a prayer for general relief, entirely inconsistent with the demand for judgment for a specified amount in

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an action for a money-demand on contract, and therefore improper, even if harmless.

The motion is granted to strike out the second and third sections of the amended complaint specified in the notice. As to other matters denied; no costs to either party.

CLUMPHA *a.* WHITING.

Supreme Court, First District; Special Term, June, 1860.

STAY OF PROCEEDINGS.—WAIVER OF IRREGULARITY.

Defendant obtained an *ex-parte* order staying proceedings, which plaintiff did not treat as void, but moved to set aside; and the court denied the motion, and directed that the order should stand.

Held, that this rendered the stay valid.

Plaintiff having entered judgment, notwithstanding an order staying his proceedings, defendant moved to set aside the judgment, and pending the motion, written notice of the judgment being served on him, in order to limit his time to appeal, defendant took an appeal from the judgment.

Held, that this was not a waiver of his motion to set aside the judgment.

Order to show cause why a judgment should not be set aside.

BONNEY, J.—On 8th February, 1860, the referee in this action made his report in favor of plaintiff. On 9th February, defendant, on a certificate of the referee that important questions of law arose on the trial, obtained an *ex-parte* order giving him twenty days' additional time to make a bill of exceptions, and, in the mean time, and until the settlement thereof, staying plaintiff's proceedings. The plaintiff on 14th February, at special term, moved to set aside said order; the motion was denied, and thereupon it was ordered that said order of 9th February stand and remain in full force, with liberty to plaintiff to adjust his costs. On 1st March, before any bill of exceptions was served, plaintiff entered judgment and issued execution;

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and on 2d March, defendant obtained and served an order that plaintiff show cause why the judgment and execution should not be set aside for irregularity, with costs, and that proceedings in the execution be stayed. Now, on showing cause, under this order, in addition to the facts stated above, it appears that on 3d March, notice of the judgment was served on defendant's attorney, and on 22d March, defendant gave notice of appeal therefrom to the general term.

The plaintiff insists that said order of 9th February, staying his proceedings, was void under the decisions in 6 *How. Pr. R.*, 367; 8 *Ib.*, 350; 18 *Ib.*, 163, and other cases referred to, and that the order of 14th February neither made effectual the prior order, nor was itself a stay of proceedings which plaintiff was bound to regard. I think otherwise. Whether or not the *ex-parte* order was obligatory, the plaintiff, instead of treating it as void, moved to set it aside, and then the court, at special term, after hearing both parties, decided in effect that this was a proper case for a stay of proceedings, and ordered accordingly; and this order was, in my opinion, clearly valid.

But it is said that defendant, by his subsequent appeal, has waived the irregularity, and cannot, after such appeal, take advantage of it. If the orders of 9th and 14th of February, or either of them, were not void as a stay of proceedings, the entry of judgment and giving notice thereof were improper, and should be vacated. After this order to show cause, under which this motion was made, was obtained and served, the plaintiff irregularly (if the stay was not void) served notice of the judgment, and defendant, within the term allowed by law, gave notice of appeal.

By such appeal the defendant certainly did not intend to waive, and in my opinion did not waive, the benefit of his then pending motion, on the ground of irregularity. In any event, whether the stay were or were not valid, he might, and doubtless intended to, appeal from the decision of the referee; and it was prudent for him to give a notice which, if his motion were denied, would be in time.

Motion granted, with ten dollars costs.

CODDINGTON *a.* CODDINGTON.*Supreme Court, First District; Special Term, June, 1860.*

DIVORCE.—FORMER ADJUDICATION.—ALIMONY.

After a decree of limited divorce has been obtained in the courts of another State, and while it remains unimpeached, the plaintiff cannot maintain an action here for an absolute divorce on the ground of adultery. *So held* on a motion for an allowance of alimony.

Motion for temporary alimony.

The action was by a wife against her husband for an absolute divorce; and the plaintiff now moved for an allowance pending the suit.

BONNEY, J.—This action was commenced in March last for an absolute divorce. The complaint is in the usual form, and among other things states that for the last year the defendant and one Elizabeth Blake have been openly living together as man and wife in this city. It also states that plaintiff and defendant have two children, of eleven and nine years of age respectively, who are now living with the plaintiff. On the complaint and a petition stating that plaintiff has not means for supporting herself and said two children, or for prosecuting this action, and that defendant has a salary of some two thousand dollars a year, the plaintiff moves for a temporary alimony and an allowance to defray the costs, fees, and expenses of the action.

In opposition to the motion the defendant shows that in January, 1858, the plaintiff, then alleging herself to be a resident of Johnson county, in the State of Iowa, filed her petition in the District Court of that county against the defendant, for a dissolution of their marriage, on the ground that it was impossible for her to live in peace or happiness with defendant, for reasons stated. That the defendant appeared in that action and put in answer. Proofs were taken, and the cause heard on pleadings and proofs on 12th March, 1858. Whereupon it was

ordered and decided by the court that the marriage contract existing between said parties be dissolved, annulled, and set aside, so far as from bed and board; that the complainant be divorced from the bed and board of defendant; and that plaintiff and defendant be restored to all the rights and privileges of unmarried persons, but neither of them are by such divorce permitted again to marry. This decree was made under and pursuant to title 17, chapter 86, section 1482, subdivision 8, of the Code of Iowa, by which it appears to be authorized. By the act of the Legislature of Iowa, approved March 22, 1858 (*Laws of Iowa*, 1858, ch. 117, p. 236), it is enacted that all persons heretofore divorced under or by virtue of any law of that State, whether from the bonds of matrimony or from bed and board, to whom a disability to marry again may have attached, shall, from and after the taking effect of that act, be restored to all the rights and privileges of an unmarried person.

The defendant also denies the adultery alleged in the complaint, and by affidavit states positively that said children were living quietly, peaceably, and happily with him until they were surreptitiously removed by the plaintiff from his custody, without his consent or procurement, on or about 25th March, 1860; and that he has always been, and is now willing to provide for his said children, and has done so to the best of his ability.

The above-mentioned decree for divorce contains no provision in relation to the custody of the children.

Upon these facts, this motion for alimony, &c., must be denied.

The plaintiff is shown to have prosecuted her action against the defendant in Iowa, and obtained a decree whereby, under the laws of that State, as now in force, the marriage contract between these parties has been annulled, and the plaintiff divorced from the bed and board of defendant, and both of them are restored to all the rights and privileges of unmarried persons, including the right to marry again. There may be some doubt as to the validity, effect, and extent of that decree in this State, but until it shall have been adjudged invalid, the plaintiff, by whom it was obtained, must in any event, be held to be bound by it, and not permitted to charge the defendant with the crime of adultery in case he has (as from the complaint and answer I infer is the fact) married again; and if the plaintiff

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has (as the defendant in his affidavit states) lately taken the children from defendant's custody, without his consent or privity, while he was and is willing, as he states, to keep and maintain them, she cannot complain that the expense of their maintenance is thrown upon her.

The motion is denied, but, under the circumstances, without costs.

HOSFORD *a.* CARTER.

New York Common Pleas; General Term, May, 1860.

TRIAL BY JURY.—JUSTICE'S COURT.—STATUTE OF FRAUDS.

It is competent for a party in an action in a justice's court, who has demanded a trial by jury, to waive that mode of trial by consent in open court.

An agreement by one who has the refusal of property, to attempt to procure a sale to a third party, is not within the statute of frauds.

Appeal from a judgment of a district court.

BY THE COURT.—BRADY, J.—The defendant demanded a jury, but on the day the action was tried, agreed in open court that the trial should be by the court, and the jury was waived. In justices' courts, unless a jury be demanded when the issue of fact is joined, the justice must hear the evidence, decide all questions of law and of fact, and render judgment. Act relating to district courts (*Laws of 1857*, § 47). By the constitution, a jury trial may be waived by the parties in all civil cases in the manner prescribed by law (section 2, article 1, constitution of 1846); and where jurisdiction of the subject-matter exists, a change by consent of the mode of proceeding may be so extensive as to convert the case from a judicial proceeding to a mere arbitration. (*Cancemi a. People*, 18 *N. Y. R.*, 128, and cases cited; see *Greason a. Keteltas*, 17 *N. Y. R.*, 491.) The justice had jurisdiction of the subject-matter, and the defendant consented to a change in the mode of trial. The defendant, though he demanded the jury, waived it by consent in open court, and by

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that act, did it in "the manner prescribed by law." He would have waived it, if he had not demanded it when the issue of fact was joined, and his subsequent waiver was equivalent to a withdrawal of the demand. There is nothing, therefore, in the objection that the trial could not be had without a jury. The objection itself, is one which should not be favored in the law. If we felt that it was fatal, and so declared, it would in effect be permitting the defendant to take advantage of his own wrong.

Upon the merits, the facts appear to be, from the return, which does not seem to be perfect, that there was a sale of the property mentioned by the witnesses for the plaintiff, under the foreclosure, and that Dickerson, the assignor, was the attorney for one of the parties to that foreclosure. At the sale, the property was bought by S. Jones, who gave the refusal of it to Dickerson, at a price named. He, defendant, was informed of this, and agreed to give Dickerson \$100 if he would introduce him to Jones, and he purchased the property at the price named. He agreed in the language of one of the witnesses, "to give Dickerson \$100 for introducing him to Jones at a certain price named." Meaning evidently, that he was to pay the \$100, if through the introduction he procured the property at the price for which Jones had purchased it. The defendant was introduced to Jones, and the assignment of the latter's bid was to the defendant's wife, through the agency of Dickerson. Thus the agreement on the part of the assignor, Dickerson, was performed, and the event upon which the defendant was to pay had occurred. It is true, that the bid was assigned to the defendant's wife, and the deed given to her; but it must be assumed that the assignment so made, was made either by the direction or with the assent of Dickerson. If the defendant chose to transfer his right or interest, that could not defeat the claim of Dickerson under the agreement.

Upon the facts thus stated, it is quite clear that this case as between Dickerson and the defendant, involves no question upon the statute of frauds. Dickerson had no interest in the land. The refusal which he mentioned to the defendant, does not appear to have been in writing, or an agreement executed in part which could be enforced in a court of equity. According to the ordinary acceptance of the term, a refusal is an understand-

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ing that nothing will be done with the subject to which it relates, until the person to whom the refusal is given, shall give some positive answer in regard to it. Whether that was the case here or not does not appear, but it is certain that there is no evidence that the assignor had any interest in the land. Indeed, the purchaser Jones had not the fee, but an inchoate right, to become absolute upon the receipt of his deed.

The judgment should be affirmed.

 ROBERT a. DONNELL.

New York Common Pleas; General Term, May, 1860.

APPEAL IN MARINE COURT.—UNDERTAKING.

On appeal in the New York Marine Court, from a single judge to the general term, no undertaking is necessary.

An undertaking on appeal to answer for the debt of another, but expressing no consideration, is void, unless given pursuant to the requirements of statute.

Appeal from a judgment.

The action was brought on an undertaking given by defendants as sureties on an appeal taken by their principal from the decision of a single judge to the general term, in an action in the New York Marine Court. The appeal was dismissed; and the respondent brought the present action against the sureties in the undertaking. Defendants had judgment, and the plaintiff appealed.

BY THE COURT.—HILTON, J.—The instrument sued on being an undertaking of the defendants to answer for the debt of another, and, expressing no consideration upon its face (2 *Blackst.*, 158), its validity as an obligation must depend upon its being shown to have been given in the form prescribed by, and pursuant to, the requirements of some statute. (*Slack a. Heath*, 4 *E. D. Smith*, 95.)

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It appears to have been given upon an appeal taken to the general term of the Marine Court from a judgment entered by the direction of a single justice of that court; and it is insisted that upon such an appeal an undertaking of this kind is required by the provisions of section 5, of "an act in relation to the Marine Court," passed July 1, 1853 (*Laws of 1853*), which declares that such appeals may be taken "in the same manner, and with the like effect as appeals in the Supreme Court, from the decision of a single judge to the general term," and it is upon the meaning of this language that the right of the plaintiff to recover, must depend.

The Code indicates the manner of taking such appeals in the Supreme Court, and their effect when taken; and to its provisions we must therefore look for the purpose of determining the intent of the Legislature in adopting the section of the Marine Court act referred to.

By referring, then, to the Code, it will be seen that section 327 prescribes the manner of taking such an appeal, which is by serving a notice in writing upon the adverse party, and on the clerk, stating the appeal to be from the judgment or some part thereof. Section 332 requires this to be done within thirty days after written notice of the judgment shall have been given to the appealing party, and sections 329 and 330, state the effect of such an appeal to be, to bring the judgment before the appellate tribunal, when it may be reversed, affirmed, or modified.

Nothing is thus far said about an undertaking, or, indeed, is any required upon such an appeal, unless the appellant desires a stay of proceedings upon the judgment, which may be obtained by an order of the court or judge, without any security whatever, under section 348, or by giving an undertaking in form like the one upon which this suit is brought.

It is thus apparent that the giving of security is in no proper sense a part of the appeal; it is neither connected with the manner of taking it, nor its effect when taken, nor is it necessary to be given to procure a review of the judgment, the appeal being perfect without it.

For these reasons I think the undertaking sued upon does not fall within the requirements of any statute, and is, therefore, of no binding force as an obligation.

I am aware that Judge Mitchell, in delivering the opinion of

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the Court of Appeals, in the case referred to by Brother Brady, uses the language he ascribes to him; but it was merely *dicta*, expressed evidently without an examination of the sections of the Code to which I have referred, and in no way connected with the question before the court for its determination.

Judgment should be affirmed.

BRADY, J. (dissenting).—The judgment in this case should be reversed. By the act of 1853, relating to the Marine Court (*Laws of 1853*, p. 1165, § 5), an appeal may be taken from a judgment entered by the direction of a single justice of that court, to the justices thereof at a general term, in the same manner and with the like effect as appeals in the Supreme Court from the decision of a single judge to the general term. Section 348 of the Code regulates the manner of taking, and declares the effect of, an appeal from a judgment entered upon the direction of a single justice of the Supreme Court to general term. The manner of taking the appeal is twofold, viz., one by service of a notice on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof; and the other is by giving these notices, and also the security required by section 348 of the Code. The effect of the appeal depends upon the manner in which it is taken. If taken without giving security, the effect is to secure the right to have the judgment reviewed by the general term only, but if the security be given, the effect is not only to secure the right of review, but to stay the proceedings pending the appeal. If an appeal to the general term of the Marine Court may be taken in the same manner as an appeal from the judgment of a single justice of the Supreme Court to the general term of that court, then security may be given, and with the like effect. The words, in the same manner and with the like effect, if they mean any thing, mean that the appellant on giving the security provided for in section 348, shall have a stay of proceedings until his appeal is determined. Such is the construction which the Court of Appeals seem to have given to the act under which the appeals to the general term of the Marine Court are allowed. Justice Mitchell says: "The manner relates to the mode of proceeding in effecting, on appeal, the notice and security to be given; the effect relates to the

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consequences produced by the appeal, as, under what circumstances it shall operate as a stay of proceedings." *People, &c., v. Clerk of Marine Court* (3 *Abbotts' Pr. R.*, 320). If no stay can be had, then the advantage of an appeal may be wholly lost to the appellant. The prevailing party may be irresponsible, and the judgment being enforced, though subsequently reversed, the appellant would be remediless or defeated upon the execution. By analogy, it would appear to be entirely adverse to the spirit of the act providing for the appeal to the general term of the Marine Court, that the appellant could not even by giving security obtain a stay of proceedings. A stay is universal where the right of review is granted, subject only to certain conditions upon which it depends, and which, in civil cases, are generally that the appellant shall give a bond or undertaking, and that the sureties who sign it shall be responsible. No objection to the form of the undertaking given in this case was urged, upon the argument; and as the undertaking was authorized by statute, and operated as a stay of proceedings, the plaintiff was entitled to judgment, unless the sureties were discharged. This is my view of the validity of the undertaking prosecuted in this action. It is said, however, that the appeal was dismissed on the application of the respondent, and that the sureties are therefore discharged if the undertaking be valid. The order dismissing the appeal was made by one of the justices of the Marine Court sitting alone. I find no authority for this act. The Marine Court is a mere creature of the statute, and is incapable of exercising any power not specially conferred. The authority to entertain appeals is given to the justice at a general term thereof, and they only, sitting as a general term, have the right to dismiss an appeal. The statute creating the general term of the Marine Court is a bald statute, and an anomaly in the organization of the courts of this State. No power is given by it to regulate the practice in reference to appeals, or to establish any rules by which they shall be heard or disposed of. It provides for appeals to the justices *at a general term*, and not to the general term of the court, a peculiarity of phraseology indicating the intention of the Legislature not to confer upon that court the power exercised by superior courts of record. The general term must possess the power, however, of disposing of appeals, either for irregularity or otherwise, because that authority

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is indispensable in the administration of justice; but that jurisdiction cannot be delegated to one justice. The statute has not authorized such a proceeding; and being unauthorized, the act of one of the justices in dismissing the appeal in that court was a nullity, and constitutes no defence to this action. The evidence given by parol, to show that the order dismissing the appeal was made by one of the justices sitting alone, was properly received. It did not tend to vary or contradict the order, but supplied a defect or omission patent on the face of it.

I think the judgment should be reversed.

Judgment affirmed.

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Supreme Court, First District; Special Term, May, 1860.

STAY OF PROCEEDINGS ON APPEAL FROM ORDER VACATING JUDICIAL
SALE.

On appeal from an order discharging the purchaser at a judicial sale, and directing his deposit to be repaid, the court refused to consider the merits of the order appealed from; but the purchaser not being shown to be irresponsible, the court refused to stay the repayment of his deposit.

Motion for a stay of proceedings.

BONNEY, J.—At a referee's sale at auction, under judgment in the above action, on 23d November, 1859, Joseph Richardson purchased the premises on Broadway, near Canal-street, for \$80,250, and, pursuant to the terms of sale, paid to the referee ten per cent. of the amount bid (\$8025). The sale was to be closed on 22d December. Said purchaser refused to complete his purchase, under the advice of counsel, for alleged defects in the title proposed to be given, and on 24th January, stated such objections in writing, and demanded repayment of said ten per cent., with interest, and payment of expenses incurred by him in relation to the purchase. This demand was not complied

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with ; and the purchaser, on notice to said referee, and the parties interested in the sale, applied to the court by petition, to be discharged from his purchase, and for repayment of said ten per cent. and other relief. The motion was heard by Mr. Justice Allen, who, on 12th March, made an order that the prayer of the petitioner be granted ; that the memorandum of the purchase be surrendered ; that the referee repay to the purchaser said \$8025 ; and that the receiver in the action pay said purchaser the interest on said \$8025, from the time when it was paid to the referee, and also pay him one hundred dollars for expenses of examining the title to the premises, and fifty dollars costs of the motion.*

From this order, the plaintiffs in this action have appealed, and now move to stay all proceedings on said order until the decision of the general term upon such appeal. The motion has been elaborately argued, and the granting of a stay is pressed upon the ground that it is clearly shown from the papers referred to on the motion (which are very voluminous), that the objections taken by the purchaser to said title cannot be sustained, and that in the order made on the petition there is error. The questions raised in relation to the title are important, and to pass upon them understandingly would require elaborate examination. They were carefully considered by Judge Allen, as appears from his opinion on deciding the motion before him ; and it is neither necessary nor proper, that I should now express an opinion as to the correctness of his conclusions. The appeal does not of itself stay proceedings on the order. The presumption is that the order is correct, and under it the petitioner is entitled to the relief thereby granted. There is no evidence that the petitioner is not responsible and likely to remain so, and able to perform his contract of purchase at any time, if he should be adjudged to do so. If the money (\$8025) remains in the hands of the referee, there must necessarily be a loss of interest to be borne by some of the parties, which seems to me quite unnecessary. It is said, indeed, that the referee has deposited the money in the United States Trust Company, at four per cent. interest ; but this only partially avoids the loss. The use of so large a sum of money may very well be worth more

* The decision is reported, *Ante*, 306.

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than even seven per cent. interest to the petitioner ; and, in my opinion, no good reason is now shown for keeping it from him. The payment of the interest, costs, and expenses by the receiver, stands, perhaps, on somewhat different grounds ; and as further costs are to be incurred, that payment may, with propriety, be stayed until the decision of the appeal ; and the surrender of the memorandum of purchase may also very properly be stayed until a final decision is had in the matter. Proceedings may, therefore, be stayed on so much of the order appealed from as directs the surrender of the memorandum of purchase, and the payment, by the receiver, in this action, of the interest on said sum of \$8025, and of the expenses (\$100), and costs (\$50) of the petitioner. As to the other part of the order, the motion for a stay is denied. Ten dollars costs of this motion to be costs of the proceedings on the petition, and abide the event of such proceedings.

SEELEY *a.* GARRISON.

New York Common Pleas ; General Term, May, 1860.

SUPPLEMENTARY PROCEEDINGS.—EXAMINATION OF THIRD PARTY.

In proceedings for the examination of third parties under section 294 of the Code, it is not necessary that execution should be first returned before the order can be made.

Whether the judgment-debtor should have notice of such proceedings, is in the discretion of the judge.

It is competent for the judge in making such order to enjoin the person to whom it is directed, from disposing of the money due till the further order of the court.

Form of affidavit and order in such proceedings.

Appeal from an order in supplementary proceedings, refusing to set aside an order for the examination of parties alleged to be indebted to the judgment-debtor.

The plaintiff having recovered judgment against the defendant, applied to a judge of the court for an order in supplement.

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ary proceedings, under section 294 of the Code, to require third parties to appear and be examined. The affidavit on which the application was made was as follows :

[TITLE OF THE CAUSE.]

“ Isaac P. Martin, one of the attorneys for the above-named plaintiff being duly sworn says, that judgment was recovered in this action against the above-named defendant, Cornelius K. Garrison, in the above-named court, on the 21st day of March, 1859, for \$16,568.96, and the judgment-roll filed on that day in the office of the clerk of the said court, and a transcript thereof filed, and the said judgment docketed in the office of the clerk of the city and county of New York. That an execution thereon against the property of the judgment-debtor has been duly issued to the sheriff of the city and county of New York. That the judgment-debtor resided in said county at the time of issuing such execution, and still so resides, and that such execution has not been satisfied ; and that Cornelius Vanderbilt has property of the judgment-debtor, and is indebted to him in amount exceeding ten dollars.

“ Sworn, &c., April 11, 1859.”

Upon this affidavit an order was granted by Judge Daly as follows :

[TITLE OF THE CAUSE.]

“ It appearing to me by affidavit on behalf of the plaintiff that an execution against the property of Cornelius K. Garrison, the defendant in this action, has been duly issued to the sheriff of the proper county upon the judgment herein, and that Cornelius Vanderbilt has property of the judgment-debtor, and is indebted to him in an amount exceeding ten dollars ; I do hereby require the said Cornelius Vanderbilt to appear before me, at, &c., on, &c., to answer and be examined concerning the same, and in the mean time, and until the further order of the court, the said Cornelius Vanderbilt is hereby enjoined and restrained from making any transfer or other disposition of the property of the said judgment-debtor, not exempt from execution, and from any interference therewith, or from doing any act

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or thing whereby the said plaintiff may lose preference, or be damaged or hindered herein."

Two similar orders were made upon similar affidavits concerning other parties.

On the return-day of the order, the parties thus required to submit to examination, appeared before Judge Hilton, and moved that the orders be discharged for want of jurisdiction. The motion was denied, and the defendant now appealed.

I. T. Williams, for the appellants.—I. Before supplementary proceedings can be instituted, remedy by execution must be exhausted. (*Lowber a. Mayor, &c.*, of New York, 5 *Abbotts' Pr. R.*, 268 ; 7 *Ib.*, 250 ; *Pudney a. Griffith*, 6 *Ib.*, 211 ; *Nagle a. James*, 7 *Ib.*, 234 ; *Sackett a. Newton*, 10 *How. Pr. R.*, 560 ; *Ritterband a. Merrequit*, 12 *L. O.*, 158.) The execution must be *returned*. (*Eagle a. Bowman*, 2 *Sandf.*, 679 ; *Sackett a. Newton*, 10 *How. Pr. R.*, 560.)

II. The proceeding under section 294 is merely in aid of the principal proceeding, and cannot be resorted to independently. (*Sherwood a. Buffalo and New York City Railroad Company*, 12 *How. Pr. R.*, 136 ; *Hinds a. Canandaigua and Niagara Falls Railroad*, 10 *Ib.*, 487.) No receiver can be appointed under this section, but only on proceedings under section 292. (*Kemp a. Harding*, 4 *Ib.*, 178 ; *Dorr a. Noxon*, 5 *Ib.*, 29 ; *Barker a. Johnson*, 4 *Abbotts' Pr. R.*, 435, and cases above cited.) Also see *Tycherson a. Tycherson* (*Voorhies' Code*, 5th ed., 406).

III. The portion of the order which enjoins any disposition, seems to be premature ; there is no such authority in section 294. (See *King a. Tucker*, 1 *Duer*, 635.)

BRADY, J.—It is not necessary in all applications under section 292 of the Code that the execution should be returned. The second subdivision of that section provides that after *the issuing* of an execution against property, and upon proof by affidavit of a party or otherwise, to the satisfaction of the court or a judge thereof, that any judgment-debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment ; such court or judge, having jurisdiction, may by an order require the judgment-debtor to appear at a specified time and

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place, to answer concerning the same. And by section 294, the judge may, after the issuing of an execution, require any person having property of the judgment-debtor, or being indebted to him in a sum exceeding ten dollars, to appear before him at a specified time and place, to answer concerning the same. The same section provides that the judge may *also* in his discretion require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper. It is not necessary when the proceeding is under the section last referred to, that the remedy should be exhausted first against the debtor. The creditor has a right, as soon as the execution is issued, to demand the application of property owned by the debtor, and, upon refusal, to proceed under the second subdivision of section 292, or to adopt a proceeding under section 294, against any person having property of the debtor, or being indebted to him in the sum of ten dollars. Section 294 does not require notice of the application or proceeding to be given to the debtor. Whether it shall be given or not depends upon the discretion of the judge conducting the proceeding; and there, in my judgment, it should rest. The intended operation of the statute might often be defeated by collusion between the judgment-debtor and his debtor if notice were in all cases required to be given; and hence the provision that the propriety of notice shall depend upon the circumstances of each case.

The section provides for notice, in the discretion of the judge; and the maxim "*expressio unius est exclusio alterius*," applies. Any other notice is excluded. The section is also analogous to section 293, which provides that after the issuing of the execution, any person indebted to the judgment-debtor may pay to the sheriff the amount of his debt, and that without notice to the judgment-debtor.

The defendant insists, in addition to the objections considered, that the restraining clause of the order is unauthorized. I think not. By section 297, the judge may order any property of the judgment-debtor in his hands exempt from execution, or due to the judgment-debtor, to be applied towards the satisfaction of the judgment; and if the order requiring the debtor of the judgment-debtor to appear, was not intended to prevent a payment of the debt to the judgment-debtor, then the judgment-debtor might collect and appropriate it at any time before his debtor

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was directed to pay it. Such was not the design of the Legislature in creating section 294. The legal operation of the order should be to suspend the right of payment; and there can be no impropriety in advising the person proceeded against, by inserting in the order a command not to dispose of the money due until the further order of the court. At all events, I think such a provision is in perfect harmony with the general character of the sections of the Code relating to supplementary proceedings, and fully authorized by them.

Order appealed from affirmed, with \$10 costs.

DALY, F. J., and HILTON, J., concurred.

SHALER & HALL QUARRY CO. *a.* BREWSTER.

New York Common Pleas; General Term, May, 1860.

CAUSE OF ACTION.—PERSONAL LIABILITY OF TRUSTEES OF CORPORATION.

Under section 12 of the act of 1848—to authorize the formation of corporations for manufacturing, &c., purposes—a trustee who is elected as such, subsequent to the neglect of the corporation to file the report required, is not thereby rendered liable for a debt previously contracted. *So held*, where the corporation subsequently to his election, and before any report was filed, gave their acceptances to the creditor, and the action was brought on such acceptances.

Appeal from an order sustaining demurrer to complaint.

This was an action to recover from the defendant who was a trustee of the Hudson River Stone-Dressing Company, a corporation formed under the general act of 1848, the amount of several bills of exchange accepted by the company. The complaint alleged that on the 18th of April, 1854, the defendant was duly elected a trustee of the Hudson River Stone-Dressing Company, and then accepted the office, and continued therein for more than six months thereafter. That on or about April 12, 1854,

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the plaintiff sold goods to the company, and received therefor its acceptances of plaintiff's bills, dated on the 20th and 27th days of April, and payable three months from date. It also alleged that the company did not within twenty days from the first day of January, 1854, make a report stating the amount of its capital, and of the proportion of the same actually paid in, and the amount of the existing debts of said company at the period last aforesaid; nor did said company cause any such report to be signed by its president and a majority of its trustees, nor to be verified by the oath of its president, nor to be filed in the office of the city and county of New York, nor to be published in any newspaper printed and published in the city and county aforesaid; and the said trustees, and also said company, wholly neglected and refused, during said period, to cause any such report to be made, signed, verified, filed, printed, and published in conformity with the provisions of section 12 of said act; and its trustees at all times thereafter, until the 31st day of July, 1854, neglected and refused to comply with the provisions thereof.

The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

At special term the demurrer was sustained by Judge Hilton, and the plaintiffs now appealed.

H. & C. S. Andrews, for the appellants, cited 1 *Kent's Com.*, 468, *b* 462; 1 *Swift's Dig.*, 12; *Freeland a. McCullough* (1 *Den.*, 421); *Sickles a. Sharp* (13 *Johns.*, 497); *Spear a. Crawford* (14 *Wend.*, 20); *Tallmadge a. Fishkill Iron Company* (4 *Barb.*, 382); *Worrall a. Judson* (5 *Ib.*, 210); *Ex-parte Van Riper* (20 *Wend.*, 614); *McCullough a. Moss* (5 *Den.*, 567); *Curtis a. Harlow* (12 *Metc.*, 3).

John E. Burrill, for the respondent.—I. Even if the defendant is legally responsible, the complaint is defective in charging an omission to report the amount of debts existing January, 1, 1854. The statute contemplates the amount existing at the time of making the report. If the company were not bound to file such a report as is described in the complaint, all the other charges as to the filing are defective. The allegation is that it

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was not filed and published in the county of New York; but there is nothing to show that it ought to have been filed *there*, rather than in any other county. The allegation that the report was not made, signed, filed, &c., is not an allegation that it was not *made*.

II. The debt was contracted before defendant became a trustee. The debt was contracted when the goods were sold; the bills were but evidence of the debt. (1 *Den.* 414; 2 *Hill*, 265.)

III. The trustees who are liable under the statute, are those who were in office when the report should have been filed, and by whose dereliction it was omitted.

BRADY, J.—The debt sought to be enforced in this case was contracted on the 12th day of April, 1854. The defendant was elected a trustee of the Hudson River Stone-Dressing Company on the 18th of April, 1854. The liability of the defendant to pay the debt mentioned, is predicated of the failure of that company to make and file within twenty days from the 1st January, 1854, or at any time thereafter until the 31st of July, 1854, the report required to be made and filed by the provisions of section 12 of the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17, 1848, and under which act the Hudson River Stone-Dressing Company was formed. Section 12, referred to, provides that such company shall annually within twenty days from the 1st day of January, make a report, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, and be signed by the president and a majority of the trustees, and be verified by the president or secretary, and filed in the office of the clerk of the county where the business of the company shall be carried on. It also provides that if any company shall fail to make such a report, all the trustees of the company shall be liable jointly and severally for the debts of the company *then existing*, and for all that shall be contracted before such report shall be made. The first question presented on the facts herein is, whether the defendant is liable for a debt contracted before he became a trustee, under and by virtue of any thing contained in the section mentioned. The trustees, whoever they were on the

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21st January, 1854, became liable, jointly and severally for all debts existing at that time against the company, and they continued to be liable for all debts contracted before the report was made. Whoever the trustees were on the 13th April, 1854, they became liable to the plaintiffs for their debt, because it was contracted on the 12th April, 1854, and no report was filed on the 13th April, which was the day following. *Expressio unius est exclusio alterius*. The defendant did not become a trustee until the 18th April, 1854, at which time the plaintiffs' rights were fixed and determined, and the liability of the persons contemplated by the statute settled. It is very clear that as to the debts of the company existing on the 21st January, the creditors had on that day a right of action against the trustees then existing, and it is apparent that the penalty of a continued omission to make the report was designed to attach to such trustees. The language of the statute is, "all the trustees of the company shall be liable for the debts of the company *then existing*, and for all that shall be contracted before such report shall be made." The report itself refers to the affairs of the company within twenty days from the 1st January, and the duty of making it did not devolve upon the defendant. He was not a trustee when that duty commenced. If the company had failed to file a report in 1855, the defendant being then a trustee, his liability would have been created. The Court of Appeals have said (Garrison a. Howe, 17 N. Y. R., 466), "The provision making trustees liable is highly penal, and the rules of law do not permit us to extend it by construction to cases not fairly within the language." I think this case not fairly within the language of section 12, and that the judgment of the special term should be affirmed.

DALY, F. J., and HILTON, J., concurred.

Judgment affirmed.

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PEOPLE on rel. DEMAREST a. GRAY.

Supreme Court, Second District; General Term, May, 1860.

INSOLVENCY.—PUBLICATION OF ADVERTISEMENT.—NOTICE OF ORDER.—RES ADJUDICATA.

Where legal notice is required to be published for ten weeks before a proceeding thereon could be had, a publication though in each of ten successive weeks, is not sufficient if the time between the first publication and the proceeding taken is less than seventy days.

In proceedings by an insolvent, to obtain discharge from debts, under the Revised Statutes, service of a notice without signature, of an order requiring creditors to show cause why a discharge should not be granted, which notice states an order made by another officer than the one before whom the proceedings was pending—is insufficient; and the defect is not cured by the discharge.*

Certiorari to the county judge of Kings county.

On April 25, 1859, the defendant obtained a discharge in insolvency, by order of S. D. Morris, the county judge of Kings; and the relators now brought a certiorari to review the proceedings. The material portions of the proceedings were as follows:

The petition and accompanying papers were presented by the insolvent to Judge Morris, who on the 11th day of February made the usual order that the creditors show cause on the 25th of April why a discharge should not be granted, and requiring notice thereof to be published for ten weeks in the State paper, and in two others specified. The publication which was directed to be made in the State paper, was made in the Albany Evening Journal, once a week for ten weeks, commencing on the 16th of February; in the other papers it was commenced on the 12th of February.

* As to what defects in these proceedings may be deemed cured by the discharge, see *Rusher a. Sherman* (28 Barb., 416).

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The notice to creditors which was served personally or by mail on the various creditors, stated that "on the 11th day of February, 1859, an order was granted by the *Honorable Josiah Sutherland, Justice of the Supreme Court*, on the petition of," &c., and required the creditors "to show cause before him at his chambers, city hall, city of Brooklyn, on," &c. This notice was neither dated nor subscribed.

On proof of such publication and service of notice, Judge Morris, on the 25th of April directed an assignment, and granted a discharge.

Stanley & Langdell, for the relators.—I. No notice was published in the State paper. The Atlas and Argus was at that time the State paper, not the Evening Journal. (Weed a. Tucker, 19 N. Y. R., 422.)

II. The notice was not published in the Evening Journal "once in each week for ten weeks successively." Between the 16th of February and the 25th of April, only sixty-eight days intervened. This is fatal. (Anon., 1 Wend., 90.)

III. The notice of the order to show cause was defective and insufficient.

B. F. Sawyer, for the defendant.—I. The publication is in the discretion of the officer, and its sufficiency can be objected to only on the return day.

II. The order for publication was made seventy-three days before the return-day, and ten publications, one in each week were made meanwhile, which is all the State requires.

III. Even if the error in the copy notice was also made in those served, the notice was still sufficient to set a man of ordinary capacity upon inquiry.

IV. The officer conducting the proceedings is to be satisfied that his order has been complied with, and this may be done by oral testimony or affidavits. (3 Rev. Stat., 5th ed., pt. 3, ch. 7, art. 6, §§ 70, 71.)

BY THE COURT.*—LOTT, P. J.—It appears that an order was made by the Hon. Samuel D. Morris, late county judge of Kings

* Present, LOTT, P. J., EMOTT and BROWN, JJ.

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county, requiring the creditors of Morgan Gray, an insolvent debtor, to show cause before him on the 25th day of April, 1859, at his chambers in the city of Brooklyn, why an assignment of the said insolvent's estate should not be made, and he be discharged from his debts, pursuant to the provisions of the statute for the discharge of an insolvent from his debts. Notice of the order was directed by him to be published for ten weeks in the State paper, and two other designated papers, and to be served on each of the creditors, in person or by mail, as particularly stated in the order. Assuming that the publication of the notice in the Albany Evening Journal was legal, it is shown by the proof of the publication that it was first published therein on the 16th day of February, 1859, and although the publication appears to have been made in each of ten successive weeks thereafter, yet the time between the first publication and the day appointed to show cause was only sixty-eight days, being consequently less than ten weeks. This notice was, therefore, not published for the period required by the order. Such a publication was expressly declared, in a proceeding of the same kind, to be insufficient. (Anonymous, 1 *Wend.*, 90.) The same rule was applied in reference to a notice of sheriff's sales of real estate, under an execution in *Olcott v. Robinson* (20 *Barb.*, 148); and it has been recognized in daily practice in relation to the publication of a summons requiring defendants to appear in suits and notices of various kinds, required to be published in judicial proceedings.

Another objection taken to the proceeding is equally fatal. There was no notice of the order served upon the creditors or any of them. It is true that a paper purporting to be a notice of an order made by the Honorable Josiah Sutherland, a justice of the Supreme Court, requiring the creditors to show cause, &c., at his chambers in Brooklyn, on the day designated in the order of Judge Morris, was served a sufficient time previous to that day; but even that does not appear to have been signed by the insolvent, or by any person whatever. Such a notice was not a compliance with the statute, nor with the order directing its service. It is insisted, however, that this defect was a mere irregularity, and that advantage should have been taken of it on the return-day. There might be some color for that position if the only defect had been the omission to sign the notice, pro-

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vided the name of the officer before whom cause was to be shown had been correctly stated; but it has no force, from the fact that the person named as the judge therein was not the officer before whom the proceeding was pending, and had no authority in the matter.

It is also insisted that, as satisfactory proof of the due publication and service of the notice was required to be given to the officer before any other proceedings were had by him, the fact that a discharge was granted is evidence that such proof was furnished, and the matter must be considered *res adjudicata*.

It is a sufficient answer to this to say, that it is the object of the present proceeding to review that adjudication. The ten weeks' advertisement, and the service of the notice on the creditors, were necessary to give the officer jurisdiction to grant the discharge. Till this was done he had no authority to proceed and adjudicate on the rights of the parties to be affected by the proceedings. This principle was decided in the matter of Underwood, an insolvent debtor (3 *Cow.*, 59); Van Slyke a. Sheldon (9 *Barb.*, 278); and in Stanton a. Ellis (16 *Id.*, 319).

The proof of such advertisement and service should be affirmatively shown, and appear on the face of the proceedings, and cannot be inferred or presumed.

This question was fully considered in the last case cited, and it is only necessary to refer to it as a conclusive authority to show that the discharge in question was unauthorized and void.

Judgment must therefore be entered setting the discharge and other proceedings aside, with costs.

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LEFFINGWELL *a.* CHAVE.*New York Superior Court; Special Term, April, 1860.*

INJUNCTION.—SERVICE OF AFFIDAVIT.—INJUNCTION GRANTED BEFORE SERVICE OF SUMMONS.—UNDERTAKING.—NEGLECT TO FILE IT.

Where an injunction is granted on a verified complaint, service of a copy of the complaint with the injunction, is service of a copy of the affidavit on which it was granted within section 220 of the Code.

Though an injunction-order cannot become operative until the action is actually commenced by service of summons, it may be granted before service of summons, so as to operate as soon as the action is commenced.

Under section 222 of the Code—prescribing that on granting an injunction, the judge shall require an undertaking “on the part of the plaintiff, with or without sureties”—an approved undertaking, executed by *any* persons of competent ability, agreeing that the plaintiff shall pay to the defendant the damages which he may sustain, and procured and furnished by the plaintiff or his attorney for the security of the defendant, is sufficient. It is not necessary that the plaintiff execute the undertaking.

Where plaintiff inadvertently neglected to file the undertaking given on his part on obtaining an injunction, until after notice of motion to dissolve it upon that ground, the court relieved him by sustaining the injunction, notwithstanding the delay in filing, upon his payment of the costs of the motion.

Motion to dissolve an injunction.

The injunction was granted as a provisional remedy, and the grounds upon which the defendants asked to have it dissolved were, that the affidavits on which it was granted, were not served; that it was granted before any service of the summons, and, therefore, before any action had been commenced; that the undertaking given on the granting of the injunction was not executed by the plaintiff, nor by any person on his behalf, but merely by sureties; and that the undertaking, and the complaint (which was used as an affidavit), on which the injunction was granted, had not been filed with the clerk as required by rule 4 of 1858, although more than five days had elapsed since the injunction was granted. Rule 4 provides that, in case of an

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omission to file the undertakings required by that rule, to be filed within five days from the granting of injunctions and certain other orders, the defendant shall be at liberty to move the court to vacate the proceedings for irregularity, with costs, as if no undertaking had been given.

Bliss & Barlow, for the motion.

Charles E. Jenkins, opposed; showed that the filing was omitted through inadvertence, and that the papers had been filed since the notice of this motion had been served; and that the only affidavit on which the injunction was granted was the verified complaint, which was served with the summons and the injunction.

WOODRUFF, J.—The objection that the affidavits on which the injunction was granted were not served, is not insisted upon. The plaintiff's affidavit shows that no other affidavit than the complaint, duly verified, was presented to the justice for the purpose of obtaining an injunction. This is sufficient for that purpose. By the plain terms of section 219, a temporary injunction may be granted, when it "appears by the complaint" that a case exists in the plaintiff's favor, entitling him to have the defendant restrained. Whether under the language of section 220, requiring that "a copy of the affidavit" be served with the injunction, the complaint and verification are to be regarded as "an affidavit," as sometimes held, or the requirement of section 220 in this be held to relate only to cases in which the injunction is obtained upon affidavit (strictly so called), after the suit has been commenced; in either view it is sufficient to serve with the injunction the complaint and verification upon which it was granted.

The next objection denies the jurisdiction of the justices to grant an injunction-order before the actual service of the summons.

The language of section 220 is: "The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment," &c.; and section 99 declares that "an action is commenced as to each defendant, when the summons is served on him or on a co-defendant, who is a joint con-

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tractor, or otherwise united in interest with him ;" and section 127, that "civil actions in the courts of record in this State shall be *commenced* by the *service* of a summons."

Under these provisions it is plain, I think, that an injunction-order cannot become operative until the summons in the action has been served ; and that the service of an injunction upon the defendant prior to the service of the summons would be irregular and ineffectual.

It does not follow, I think, that the injunction-order may not be signed by the justice preparatory to such service, and be delivered by the justice to be served with the summons, although until the summons is served it has no effective operation.

The language, the injunction may be granted "at the time of commencing the action, *or* at any time afterwards," was meant to define two periods. If the summons must in all cases be served before the justice has jurisdiction to grant the order, then no injunction can issue until *after* the action *has been* commenced ; and the words, "at the time of commencing the action," are without meaning and superfluous ; but the Code means that a plaintiff may not only have an injunction *after* his action is commenced, but that he may have it at that *prior time* described by the words, "at the time of *commencing*" his action ; and in this connection those words mean, while the work of commencing the action is going on, and not after it is finished.

It imports that the injunction may be obtained, so that it shall operate at the time when, and so soon as, the action is commenced, and not alone after it is commenced.

This accords with good sense. It meets a very large class of cases, in which it is of vital importance to a plaintiff to enjoin the defendant at the very instant he is apprised that an action is commenced, and in which the defendant would, but for such injunction, defeat the very object of the suit.

The section which declares that the court is deemed to have acquired jurisdiction in a civil action from the time of the allowance of a provisional remedy (§ 139), is in harmony with this construction, and sustains it.

The objection that the undertaking was not signed by the plaintiff, or his agent, or by some person who in very terms is described on the face of the undertaking, as acting "on the part

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of the plaintiff," raises a question in regard to which there has been some conflict of opinion.

The language of section 222, is that, "the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages," &c.

In my opinion the just meaning of this language is satisfied, and all the proposed benefits to the defendant are secured by construing the words, "on the part of the plaintiff," as simply words of contrast or opposition to the part of his adversary; and that an approved undertaking, executed by any persons of competent ability, agreeing that the plaintiff shall pay to the defendant the damages which he may sustain, if it be procured and furnished by the plaintiff or his attorney for the security of the defendant, is an undertaking *on the part of the plaintiff*, within the meaning of this section.

If this be not so, then, "on the part of the plaintiff," can only mean "executed by the plaintiff." No other person can execute it who would not be (as between him and the plaintiff) a mere surety.

It is suggested that his agent or attorney may execute the undertaking. No doubt he may, but if he executes it by the plaintiff's authority, then it is, in law, the plaintiff's undertaking, and not his own; if he have no such authority, then he executes it just as any other person would execute it, binding himself, and not the plaintiff; and he is just as much a surety as any other person would be.

Suits are often necessary when a plaintiff is out of the State or sick, or under disability, or an infant, or otherwise incompetent, or unable to execute an undertaking, or to authorize any agent or attorney to do so. I cannot concede that it was intended that in such case no injunction should be issued.

The words "by the plaintiff, with or without sureties," had they been used, would be plain, and would require the plaintiff to execute them; but the words, "on the part of the plaintiff, with or without sureties," are fully satisfied, if any person or persons in aid of the prosecution, acting in furtherance of the action, at the instance of the plaintiff, will peremptorily and unqualifiedly undertake that the plaintiff shall pay to the defendant the damages which he may sustain.

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The terms, "with or without sureties," would seem to indicate that whoever gives the absolute undertaking, whether it be the plaintiff himself, or some person or persons whom he or his attorney may procure, there may still be sureties if the judge so require. The forms of undertaking now in common use, make all the undertakers, in form and in fact, principals as between them and the defendant, and in that sense they are absolute undertakings on the part of the plaintiff, and not undertakings with sureties; and such is the undertaking in this case.

It is only in accordance with the language of the section under consideration, to say that an absolute undertaking that the plaintiff will pay (whether executed by him or by other persons), is an undertaking on the part of the plaintiff, and the court or judge may receive it if satisfactory, or he may require the security of others who shall execute in very terms as "*sureties*."

That those who sign as sureties may so express their obligation is plain. Oftentimes they will prefer to do so, and the utmost that can be claimed by a defendant (if so much even be conceded) is, that there shall be a principal in the undertaking *in form*, and whom *he* can treat as *principal* without the necessity of demand or notice; and if the responsibility of such principal be inadequate, then that he may have sureties. This construction would harmonize with the claim that in using the terms, "with or without sureties," the Legislature necessarily imply that there must be a principal, since otherwise there is no surety.

If a defendant bring his action on an undertaking in the form in common use, in which the undertaking is absolute, he will be the first to say, "as between me and yourselves, you are principals and not sureties." If so, then he has an undertaking given on the part of the plaintiff strictly *without sureties*.

Nor is it doubtful, I think, that an undertaking in the form, "I undertake and promise," &c., executed by one person, with a further agreement in due form by another person, by which he became *bound* as *surety*, would be a compliance with the statute in its terms, as well as its meaning, although the plaintiff signed neither. Indeed, if that form of undertaking had been introduced into use, I greatly doubt that this question would have ever arisen.

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But as undertakings are in general in form absolute, binding all the signers as principals, it has happened that they have been called sureties, and somebody is sought for to be principal, in the terms "on the part of the plaintiff."

I repeat, that an approved absolute undertaking, that the plaintiff will pay, &c., is enough, whether it be executed with sureties or without sureties; and such an undertaking has been given here.

I am aware that there has been on this point, also, a difference of opinion. The late Chief-justice Duer, in *Richardson a. Craig* (1 *Duer*, 666), held that similar words in the section (182), prescribing the undertaking to be given on obtaining an order of arrest, made it necessary that the plaintiff should sign the undertaking. But he was compelled to make his own construction yield when the plaintiff was an infant, &c. In *Sieff a. Shausenburgh* (September 22, 1858), I am told that Chief-justice Bosworth held an absolute undertaking sufficient to justify an order of arrest, though neither signed by the plaintiff nor by any one professing to be his agent;* and see also *Askins a. Hearn*s (3 *Abbotts' Pr. R.*, 184); *Bellinger a. Gardner* (12 *How. Pr. R.*, 381).

The last objection to the plaintiff's proceedings is, that he has

* *SIÉFF a. SHAUSENBURGH* came before the court at special term on a motion to discharge from arrest.

BOSWORTH, J.—Defendant having been arrested in an action of assault and battery, moves to vacate the order of arrest, because the undertaking on the part of the plaintiffs is executed by only one surety, and not by either plaintiff; and if that is denied, to mitigate bail, the sum required being \$1000.

The alleged irregularity is not specified in the notice of motion. (*Rule 25.*) The undertaking is valid, though signed by only one surety and not by the plaintiffs. (4 *Seld.*, 446.) The sufficiency of the surety is not questioned. The amount of bail cannot be reduced, as the opposing affidavits are explicit as to the fact of an aggravated assault, and on this motion it is impossible to say that they are untrue, and that the affiants on the part of the plaintiffs testify truly. That question must be determined by a jury.

Motion denied, but without costs to either party.

Compare *Republic of Mexico a. Arrangoiz* (5 *Duer*, 644), where it was held that an undertaking by an agent of a foreign government which is plaintiff, is sufficient as an undertaking on the part of the plaintiff under the provision of the Code, relative to undertakings on arrest. (See also *North American Coal Company a. Dyett*, 4 *Paige*, 273.)

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not filed the papers upon which the injunction was granted, as required by the fourth of the rules of court. When the notice of this motion was given, the fact so stated was true, and the court might vacate the injunction-order on that ground. But it appears by the affidavit on behalf of the plaintiff, that the omission to file the papers was an inadvertence, and so soon as the notice of motion was received, the papers were filed. Under such circumstances the court have a discretion to relieve the plaintiff from the consequences of his omission; but as the defendant's motion is regular, such relief should be granted on terms. Indeed, if the plaintiff had at once given notice of the filing, and sought a waiver of the motion, I would have allowed no costs to the defendant if he persisted in his motion.

All the other grounds of motion must be denied; but upon this last point the motion must be granted, unless the plaintiff pays the costs of motion, \$7. If he pay those costs within five days, the motion is denied.

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New York Superior Court; General Term, June, 1860.

AMENDMENT.—APPEALABLE ORDERS.—PLEADING.

In what cases an order refusing to allow an amendment of the pleadings is appealable as involving the merits, or affecting a substantial right.

A party should not have leave to put in a verified pleading containing allegations in alternative which are inconsistent.

Appeal from an order refusing leave to amend the complaint.

The facts of the case are fully reported, 7 *Ante*, 193, and 8 *Ib.*, 253, in which latter volume the decision on the order now appealed from is stated.

Albert Mathews, for the appellant.

Edward S. Clark and *Charles Tracy*, for the respondent.

BY THE COURT.—ROBERTSON, J.—This is an appeal from an order made at special term, refusing to allow an amendment of the complaint after a trial, a hearing at general term upon appeal, and a new trial ordered.

The action was commenced in April, 1856, and the issues in it tried in December, 1856; the order for a new trial was made in July, 1858, and the application for leave to amend in March, 1859.

I am well satisfied that the order denying leave to amend was not an appealable one. The power to amend by leave of the court is contained in section 173 of the Code, and the orders from which appeals may be made, are enumerated in section 349. If this is appealable at all, it must be under the third subdivision of that section as involving the merits of the action, or some parts thereof, or affecting a substantial right. This motion did not involve the merits of the action, for until the amendment was allowed and made, there was no mode of discovering what they would be; for the merits of the action as they stood under the previous complaint, charging neglect to buy and sell stock, would be materially different from the merits of an action under the amended complaint, which charges that the defendants either neglected to buy, or else sold for their own benefit: for if the latter alternative turned out to be true, the former would become wholly immaterial, and no part of the merits.

If it be contended that it was a proposed change of the merits of the action, that would come within the exclusion of the last case enumerated in section 173, as a substantial change of the claim; an order involving the merits does not include those which rest in the discretion of the court (*St. John v. West*, 4 *How. Pr. R.*, 331), and the motion for this was addressed entirely to such discretion; the plaintiff, in making it, was bound to show an excuse for not having originally prepared his complaint in the proposed new form, and also for laches in his application; both of these matters were entirely addressed to the discretion of the court, for until lapse of time and subsequent proceedings has rendered an application to the court necessary, the parties are entitled to amend as matters of course under section 171.

The order under review certainly does not involve a substantial right. If the plaintiff is able to succeed upon one of the

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alternative states of facts contained in his amended complaint, he can as well try which is true in two actions as one. A decision against him in this case merely disposes of one of those alternatives, leaving him to experiment on the other in a new action, which could not be affected by the judgment in the present one; and the right to the recovery of the money due upon the true state of facts is the substantial right to be affected by an order, from which an appeal lies under subdivision 3 of section 349. (*Tallman v. Hinman*, 10 *How. Pr. R.*, 90.)

In *Whitney v. Waterman* (4 *How. Pr. R.*, 313), and *Otis v. Ross*, 8 *Ib.*, 195), the parts of the pleading stricken out might have affected the rights of the party, and he had no redress for a wrong judgment except on appeal; the decision of the action upon the pleadings thus expurgated, excluded him from any relief in any action, or any modification of the relief in the action in which the pleading was amended, except by restoration on appeal of the parts stricken out; nor was the plaintiff barred in this case by the statute of limitations from bringing such other action, although, perhaps, even if he were, it would only form an argument addressed to the discretion of the court, and not give a right to appeal not otherwise existing. There is nothing in the character of the action, or the amendment, to take it out of the general rule as laid down in this court. (*Ford v. David*, 3 *Bosw.*, 569, 596; *Marble Iron Works v. Smith*, 4 *Duer*, 162; or in the Supreme Court in *Phinckle v. Vaughan*, 12 *Barb.*, 215; *Travers v. Binger*, 24 *Ib.*, 614; *Kingsland v. Bartlett*, 28 *Ib.*, 480; *St. John v. West*, 3 *Code R.*, 85; *S. C.*, 4 *How. Pr. R.*, 331.)

If this were, however, an appealable order, the opinion of the learned judge who made it, as reported in 3 *Bosw.*, 639,* furnishes ample reasons for sustaining it. The ground of laches, the unmeritorious character of the application, the defects in the proposed new pleading, and the absence of any prejudice to the plaintiff by refusing the order, are fully set forth, and justify the decision. I might add there is some danger in allowing similar amendments, in a case where a complaint contains statements of facts, as sworn to in this case, and no excuse is shown that he did so in consequence of being misled by any apparent but

* *S. C.*, 8 *Ante*, 253.

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unreal state of facts; it is only alleged that the plaintiff found it necessary to amend his complaint by swearing to facts in the alternative, one of which is necessarily inconsistent with that formerly sworn to in the complaint. The oath required to verify pleadings ought not to be so lightly treated; its sanction is required for every suitor who enters courts of justice, that he may not harass a party defendant by an action for matters to which he will not swear upon knowledge or belief founded on information.

In this case, the plaintiff proposes to conform his belief to the requisitions of the court of the facts necessary to make out a case. The main allegation in the new pleading is put in a form which cannot be verified, or rather which renders the allegation itself untrue, because it is that of a dilemma, and is wholly independent of either knowledge or information of either the alternative facts assumed by it.

In my view of this case, the order appealed from should not be disturbed; but as I am satisfied no appeal lay from it, the present appeal must be dismissed, with ten dollars costs, to be paid by the appellant.

MATTER OF KEYSER.

Supreme Court, First District; Special Term, July, 1860.

ASSESSMENTS IN THE CITY OF NEW YORK.

Of the requisites of a petition to vacate an assessment, for fraud or irregularity, under the act of 1858.

Petition to vacate an assessment.

A. R. Lawrence, Jr., for the petitioner.

H. H. Anderson, for the corporation.

BONNEY, J.—This petition states that in September, 1850, a resolution and ordinance were passed by the Common Council,

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and approved by the Mayor of New York, for regulating and grading part of the Second Avenue, &c., and appointing assessors of the expenses thereof, which ordinance, in March, 1853, was amended; that under the authority of such resolution and ordinance, a contract for part of the work thereby directed was made in February, 1851, between the Corporation of New York and Daniel Gallagher, by which Gallagher (among other things) agreed to complete such work on or before 1st November, 1851; that said work was not completed until 27th May, 1854; that in August, 1854, an estimate or assessment, for payment of the expenses alleged to have been incurred for this regulating and grading, was made by the assessors, to whom by law that duty was confided, which was duly presented to the Common Council, and such proceedings thereupon had, that, in November, 1854, it was, by resolution passed in each Board and approved by the mayor, confirmed; that by said assessment, a lot on the easterly side of Second Avenue, between Forty-eighth and Fortyninth streets, within the limits of said Gallagher's contract, was assessed \$221.49; that such lot belonged and was assessed to the petitioner; that said assessment also embraced other parts of said work performed by James Gallagher and John Pettigrew, under other contracts; that the total amount of said assessment is \$388,519.22, made up as in the petition stated.

That there is *a fraud* and *an irregularity* in the proceedings relative to said assessment made, confirmed, and approved, as aforesaid, which consists in this: that \$3364.50 is included in said assessment as the sum required to defray the charges or expenses for inspecting the work. That neither said ordinance nor said resolution, as amended, authorized any person to hire or employ an inspector on said work, or to include in the assessment any charge for the services of an inspector.

That, at the time of the making of this contract, an ordinance was in force which made the street commissioner, by virtue of his office, a city surveyor, and authorized him to appoint inspectors of contract-work connected with his department in all cases where the Common Council might deem the public interests to require such inspection.

That, at the time of the confirmation of such assessment, an act of the Legislature, passed April 12, 1853, was in force, which, by section 10, enacted that "No additional allowance beyond

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the legal claim under any contract with the corporation, or for any service on its account, or its employment, shall ever be allowed."

That (as petitioner is advised and believes) said assessors were not authorized to include in the said assessment such sum of \$3364.50 for inspecting the work, and that the entry thereof is a fraud upon the owners of the property assessed, inasmuch as the appointment of an inspector is not authorized by said ordinance, passed in September, 1850; that said item for inspection was not a legal claim against the corporation when the assessment was confirmed, and the confirmation and allowance thereof was a fraud on said owners of the property assessed; and the entry of said item in the assessment was illegal, irregular, and fraudulent, and renders the assessment void.

That, by his contract, Daniel Gallagher agreed that in case said work was not finished on 1st November, 1851, he would pay said corporation, or allow to be retained out of the money payable to him for the work, ten dollars for every day during which said work remained unfinished after 1st November, 1851; that Gallagher did not finish the work until 27th May, 1854, and it was the duty of the corporation to deduct, from the money due him on the contract, ten dollars for every day after 1st November, 1851, during which the work remained unfinished, and the owners of the property assessed were entitled to have said deduction made; that the number of days during which Gallagher was in default, in not completing said contract (exclusive of Sundays), is eight hundred and five, and \$8050 should have been deducted from the money paid him; that the full contract price on said work was nevertheless allowed and included in said assessment without any deduction whatever for such default, and the action of the assessors in so making the assessment, and of the Common Council in confirming the same, was a fraud upon the petitioner and other owners of the property assessed; and, therefore, said assessment is fraudulent and void; that such assessment is a lien on said lot of the petitioner, by which he is aggrieved, and he prays that such assessment may be declared to be null and void, and may be vacated and set aside.

This application is made under the act entitled "An act in relation to frauds in assessments for local improvements in the

city of New York," passed April 17, 1858 (*Laws of 1858*, 574, ch. 338), which enacts as follows:

"SEC. 1. If, in the proceedings relative to any assessment or assessments for local improvements in the city of New York, or in the proceedings to collect the same, any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved thereby may apply to a judge of the Supreme Court in special term or in vacation, who shall thereupon, on due notice to the counsel of the corporation of the city in which the lands so assessed are situated, proceed forthwith to hear the proofs and allegations of the parties.

"SEC. 2. If, upon such hearing, it shall appear that the alleged fraud or irregularity has been committed, the said assessments shall be vacated, and the lien created thereby, or by any subsequent proceedings, shall cease."

The counsel for the corporation appears and moves that this application be denied, and the petition dismissed, upon two grounds—

First. That said act of the Legislature, under which the application is made, is unconstitutional, as in violation of article 6, section 8, of the constitution of this State, which provides that justices of the Supreme Court shall not hold any other office or public trust. The view which I take of this case renders it unnecessary for me to pass upon this objection. The question, as I understand, has been decided by some of the justices of this court, and is now pending before the general term on appeal.

Second. The second objection taken to the petition is, that it contains no such allegation of "*fraud or legal irregularity*," in the proceedings relative to the assessment in question, as entitles the petitioner to relief under said act, admitting the act to be constitutional and valid; and this objection, in my opinion, is well taken.

The words "legal irregularity," as here used, mean, as I understand them, a deviation from, or want of compliance with the forms of proceeding required by law to be taken and followed in making the assessment complained of, or in collecting it. No such deviation or defect is here alleged; but, on the contrary, the petitioner states (as above-mentioned) that an estimate or assessment was made by the officers (assessors) to whom, by law, that duty was confided; which estimate or assessment was duly

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presented to the Common Council, and was by the Common Council confirmed; and no act or omission is stated to have been done, or to have occurred in those proceedings, or any of them, by which any requirement of the statute, under which the proceedings were taken, was violated or not fulfilled. It is scarcely necessary to remark, that a mere allegation of irregularity, without stating how it was committed, is of no avail in a pleading, especially when it is also stated, in the same pleading, that the proceedings were taken by the proper officers, and duly presented to the appropriate tribunal, and confirmed.

Does this petition, then, allege *any fraud* in the proceedings in question, in such manner that the court can take cognizance thereof, and hear proof in relation to it? The allegation is, that the item of \$3364.50 included in the assessment, for expenses of inspecting the work, was improperly allowed, because there was no authority for the employment of an inspector, or for inserting such charge in the assessment. That \$8050 should have been deducted from the amount allowed Daniel Gallagher for work done under his contract, for his default in not completing such work within the time limited by the contract, which deduction was not made; and that such allowance of said item and omission to make such deduction were frauds upon the parties assessed.

But it is not stated in the petition, nor was it pretended by counsel on argument, that the petitioner, or any other person before the assessors, objected to the allowance of said item, or asked to have any deduction made from the amount of Gallagher's contract; nor, if any objection was raised before the assessors on either of those points, that such question was not fully and fairly heard, and evidence received in relation thereto, and honestly (even if erroneously) decided by the assessors; nor that any objection whatever was made to the confirmation of said assessment by the Common Council; nor that the petitioner and all other parties interested had not full notice of the proceedings and opportunity to appear, and be heard before the assessors, or on the application to confirm the assessment; nor that the allowance of said item for inspection, or the omission to make such deduction from the amount allowed Gallagher, was caused or produced by any concealment, private understanding, improper inducement, or fraudulent act whatever.

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In my judgment, no such allegation of fraud or irregularity is made in this petition as entitles the petitioner to any relief under the act of April 17, 1858. To hold otherwise would enable any person, whose property may be subject to assessment for any similar improvement, to lie by and permit the proceedings to be taken and completed without objection, and then, on the mere allegation that some item of charge, however inconsiderable, allowed by the assessors, was not authorized by the ordinance under which the proceedings were had, or was larger than it should be, to demand that his property, benefited by the improvement, should be released from the assessment *on the ground of fraud*. And would also enable any person, whose objection to the allowance of any item included in the assessment had been fully and fairly heard and overruled, both by the assessors and by the Common Council, to apply under this act to set aside the assessment after confirmation, upon the mere allegation that such item was not a legal or proper charge, and therefore its allowance was a fraud upon the parties whose property was assessed.

The application must be denied, and the petition dismissed.

ERRATUM.

On page 163, line 5 of the opinion, for "repealable" read "appealable."

D I G E S T

OF

ALL POINTS OF PRACTICE

EMBRACED IN

THE STANDARD NEW-YORK REPORTS,

Issued during the period covered by this Volume :

Viz.—20 NEW-YORK R. (6 *E. P. Smith's R.*) ; 29 and 30 BARBOUR ; 3 BOSWORTH ;
2 HILTON C. P. R. ; 10 ABBOTTS' PR. R. ; and 18 HOWARD'S PR. R. ; and in the LAWS
OF 1860.

ABATEMENT AND REVIVOR.

An order of revivor, in the name of A. "as executor" of a deceased plaintiff, standing in full force at the time of the trial, is conclusive to show that the action has been properly revived, and that A. can recover all that the testator might have recovered. *Sp. T.*, 1859, Underhill *a.* Crawford, 29 *Barb.*, 664 ; S. C., 18 *How. Pr.*, 112.

CONTINUANCE.

ABSENT AND ABSCONDING DEBTORS.

ATTACHMENT ; JUSTICE'S COURT, *tit. Attachment.*

ACTION.

1. An action against the directors of a corporation, seeking to charge them personally with a debt of the corporation, which as against the corporation vested in contract, is an action on contract. *Durant a. Gardner, Ante*, 445.
2. The complaint in such action is not to be deemed as uniting several causes of action because it sets forth several grounds, on either of which the defendants would be liable. *Ib.*
3. An action against the sheriff on his liability as bail to the action, is

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not an action for neglect of his official duty. The damages are the amount of the judgment, and are not subject of mitigation by evidence of the insolvency, &c., of the prisoner. *Metcalf v. Stryker, Ante, 12.*

4. In an action for wrongfully taking and detaining personal property, the complaint demanded judgment for damages in the amount of the value of the property, with interest.

Held, the summons not being before the court, that it was not to be deemed that plaintiff's action was founded on a waiver of the tort, and a resort to an implied promise to pay, but that the foundation of the action was the tort. *Chambers v. Lewis, Ante, 206.*

5. Of the election of remedies under the Code. *Ib.*
6. An action cannot, without leave of court, be maintained on a judgment of a justice after it has been docketed with the county clerk. *Lyon v. Manly, Ante, 337.*
7. *It seems*, that an action may be brought on a justice's judgment, by an assignee thereof, without any restriction. [4 Duer, 607 ; 12 How. Pr., 537 ; limiting Code, § 71.] *Clark v. Story, 29 Barb., 295.*
8. An action may be maintained for the recovery of specific moneys (in the nature of replevin), if the title has not passed. [Co. Litt., 286, b.] 1859, *Graves v. Dudley, 20 N. Y. (6 Smith), 76.*
9. A common informer cannot sue for a penalty, unless the statute expressly gives him the right to do so. [1 Metc., 232 ; 2 East, 569 ; 5 *Ib.*, 513 ; Bacon's Abr., Action qui tam, A.] 1859, *Gen. T., Seward v. Beach, 29 Barb., 239.*
10. Of the action for money had and received. *Lott v. Swezey, 29 Barb., 87.*
11. Of the action for nuisance. *Hess v. Buffalo and Niagara Falls Railroad Company, 29 Barb., 391.*
12. Of the action under the statute (2 *Rev. Stat.*, 338), giving treble damages for certain trespasses on land. *Van Deusen v. Young, 29 Barb., 9.*
13. Of the distinctions between the actions of trespass and of waste. *Ib.*

ATTORNEY-GENERAL ; CAUSE OF ACTION ; CORPORATION ; MARRIED WOMEN.

ADVERTISEMENT.

Advertisements in the state-paper, legalized. *Laws of 1860, ch. 174.*

AFFIDAVIT.

AFFIDAVIT.

1. The affidavit of a mortgagee, seeking to acquire the title of a purchaser of lands sold on execution, must state the sum due or to become due, in such terms that perjury can be assigned thereon. 1859, *People v. Becker*, 20 *N. Y. (6 Smith)*, 354.
2. An affidavit stating "that there is actually due or to become due *** the sum of \$6,433, as claimed by this deponent," is fatally defective. *Ib.*

ALIMONY.

Alimony may be granted pending a reference to determine the proper allowance of permanent alimony. *Forrest v. Forrest*, 3 *Bosw.*, 650.

AMENDMENT.

1. The warrant of attachment issued under the Code as a provisional remedy, may be allowed to be amended by supplying the omission of the signature of the attorney. *Kissam v. Marshall*, *Ante*, 424.
2. An undertaking given on the issuing of such a warrant, which is insufficient in amount, may be allowed to be amended by filing a new undertaking. *Ib.*
3. Such amendments may be allowed on the hearing of a motion to vacate the attachment on the ground of these defects. *Ib.*
4. In an action brought by a corporation claiming to have been incorporated in 1852, under a general law, it appeared on the trial that a part of the indebtedness sued on accrued to a corporation of the same name as plaintiffs, before that date; that such corporation was originally formed by special charter, and that on the expiration of that charter, in 1852, the present corporation was organized under the general law, and the portion of the indebtedness in question was passed to it, with other assets, by assignment.

Held, 1. That the variance could not be amended by a referee.

2. That the court had power to amend it upon terms. *Union Bank v. Mott*, *Ante*, 372.

5. Of the proper terms to be imposed on such amendment. *Ib.*
6. Where leave is given, after trial before a referee, to amend the summons and complaint, by adding a new and distinct cause of action not connected with those set forth in the original complaint, the order should only be granted upon condition that the plaintiff stipulate to set aside the report, and vacate the order of reference, with costs to abide event; and the order should provide for service of the amended

AMENDMENT.

- summons and complaint, and for time for defendant to answer. *Alaben a. Wakeman, Ante*, 162.
7. A judgment by confession founded on a defective statement, cannot be amended so as to sustain its priority over intervening judgment-creditors. *McKee a. Tyson. Ante*, 392.
 8. Leave may be granted to the plaintiff to amend the confession, as against the defendant, by supplying defects in the statement according to the facts proved on motion to set it aside. *Ib.*
 9. Leave to amend the complaint so as to sustain proceedings for a claim and delivery in opposition to a motion,—denied, because no basis for the amendment had been laid on the motion. *Supreme Ct., Sp. T.*, 1859, *Seymour a. Van Curen*, 18 *How. Pr.*, 94.
 10. *It seems* that a purely formal error, *e. g.*, the misnomer of a party, no one having been misled, should be amended on the trial without imposing any terms. 1859, *Bank of Havana a. Magee*, 20 *N. Y. (6 Smith)*, 355.
 11. Such an amendment may be made before or after judgment, and on a judgment taken by confession, if in furtherance of justice. *Ib.*
 12. No variance is to be deemed material unless the adverse party shows that he was misled, and in what respect. *So held* where the complainant stated a note payable generally, and the proof was of a note payable at eight months from date. *N. Y. Superior Ct.*, 1858, *Chapman a. Carolin*, 3 *Bosw.*, 456.
 13. The New York Common Pleas may, on appeal, taken in good faith, from an inferior court, allow an amendment necessary to conform the proceedings to the Code. *N. Y. Com. Pleas*, 1859, *Wood a. Kelly*, 2 *Hilt.*, 334.
 14. After service of an amended answer the replies to the original answer cease to be pleadings in the cause, so far as the issue is concerned. *N. Y. Superior Ct.*, 1858, *Fry a. Bennett*, 3 *Bosw.*, 200, 233.
 15. The rule which governs motions to compel amendments of pleadings is: if an answer, a separate denial, or defence, otherwise good, be loaded with unnecessary or redundant matter, a motion should be made to have the matter expunged under § 160: if either of such pleadings contain new matter, not redundant, and doubts are entertained of its sufficiency in law, it may be tested by demurrer: if the whole answer be frivolous, application for judgment, under § 247, is the proper remedy: and if an answer, denial, or separate defence, be false or irrelevant, the only remedy is a motion to strike out, under § 152. [6 *How. Pr.*, 358.] A motion to strike out a *whole* defence, under § 160 cannot be granted, but if on a motion framed under that section, the notice ask for general relief, it may be considered as made

ANSWER.

under § 152, and reaching the whole answer or defence. *Supreme Ct., Sp. T.*, 1858, *Blake a. Eldred*, 18 *How. Pr.*, 240.

16. Where, pending an action, the defendant recovers judgment against plaintiff in another action on the same matter, which he has set up as defence, it is proper to strike out the statement of such matter as a defence from the answer in the pending suit, though relief might be granted by allowing supplemental reply. *Supreme Ct.*, 1859, *Harris a. Hammond*, 18 *How. Pr.*, 123.
17. Allegations in an answer seeking to set up equities against an indorser, before maturity, against an action by another holder, struck out as irrelevant. *Arrangoiz a. Frazer*, 2 *Hill.*, 244.

ANSWER, 10; JUDGMENT, 22.

ANSWER.

1. A defence which is inartificially drawn, and commingles denials and new matter, is not, for that reason, to be held bad on demurrer, if, by a liberal construction, its allegations constitute a defence. *Rice a. O'Connor. Ante*, 362.
2. Though a specific denial of a part of the complaint may properly be coupled with a general denial of the rest, such a general denial is to be treated as sham, if it merely purports to deny what is "inconsistent with the facts stated in the answer." The court cannot know whether the allegations of the answer are facts. *Supreme Ct., Sp. T.*, 1858, *Blake a. Eldred*, 18 *How. Pr.*, 240.
3. An answer that defendant "says that he denies," is insufficient as a denial, and might be struck out, on motion, under § 152 of the Code. *Supreme Ct., Sp. T.*, 1858, *Blake a. Eldred*, 18 *How. Pr.*, 240.
4. An averment in a complaint for rent, that "the rent was, as it became due, duly demanded," is put at issue by a denial, in the answer, of "each and every allegation in the complaint, wherein and whereby the defendant is charged with being liable for any rent to the plaintiffs, or of any sum being due or owing from him to them." *N. Y. Common Pleas*, 1858, *Academy of Music a. Hackett*, 2 *Hill.*, 217.
5. A denial upon information and belief is no traverse. The defendant must aver that he has no information or knowledge sufficient to form a belief. *N. Y. Com. Pl.*, 1858, *Therasson a. McSpedon*, 2 *Hill.*, 1.
6. In an action for taking and converting goods, the answer contained a general denial, and, as a second defence, a justification under an execution against third parties.

Held, that evidence of a levy under an execution prior to that stated in the answer was not admissible. If defendant had made such

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- a prior levy, and was thereby entitled to the possession of the goods, it was matter to be specially pleaded. *Supreme Ct.*, 1857, *Graham a. Harrower*, 18 *How. Pr.*, 144.
7. Though civil death abates an action for personal tort, an answer setting up that defendant is civilly dead, is inconsistent, for the fact that defendant has put in the answer proves that he is alive; the answer, therefore, is bad on demurrer. *Freeman a. Frank*, *Ante*, 370.
 8. An answer to a complaint for slander, which shows that defendant was informed and believes the charges were true; that the offences charged were in fact committed, and, as defendant believes, by the plaintiff; and disavowing malice in making the charges—is sufficient, as a justification. *Steinman a. Clark*, *Ante*, 132.
 9. *It seems*, that a defence founded upon the statute against betting and gaming [1 Rev. Stat., 662], must be expressly set up in the answer. *Valton a. National Fund Life Assurance Co.*, 20 *N. Y.* (6 *Smith*), 32, 36.
 10. Where a party is entitled to amend of course, he may amend by substituting an entirely different defence for that set up in the original answer—*e. g.*, limitations, in lieu of a counter-claim. [Following *Thompson a. Minford*, 11 *How. Pr.*, 273; and *Mason a. Whitely*, 1 *Abbott's Pr.*, 85; in preference to 10 *How. Pr.*, 140.] *Supreme Ct.*, *III. Dist.*, *Sp. T.*, 1859, *Wyman a. Remond*, 18 *How. Pr.*, 272.
 11. Insufficient answer of failure of consideration, in an action on a note given for a subscription. *Palmer a. Smedley*, 18 *How. Pr.*, 321.
 12. An answer merely stating that defendant was an accommodation indorser, of which fact the holder of the note had notice, held frivolous. *Pettigrew a. Chave*, 2 *Hilt.*, 546.

AMENDMENT; PLEADING.

APPEAL.

1. The provisions of chapter 1 of title 11 of the Code, entitled "Appeals in General," apply to appeals to the New York Common Pleas, from inferior courts. 1859, *Wood a. Kelly*, 2 *Hilt.*, 334.
2. Section 344 of the Code amended by adding at the end: An appeal also may be taken to the Supreme Court from any order affecting a substantial right, made by a county court, or a county judge, in any action or proceeding; and such appeal shall be heard on a copy of the papers on which the order appealed from was made. *Laws of 1860*, 786, ch. 459, § 11.
3. An order vacating a default is not appealable. [2 *E. D. Smith*, 223.] 1858, *Churchill a. Mallison*, 2 *Hilt.*, 70.

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4. A motion to open an inquest is addressed to the discretion of the court, and is not appealable. 1858, *Muldenor v. McDonogh*, 2 *Hill.*, 46.
5. An appeal does not lie under section 352 of the Code to review a determination in summary proceedings to recover possession of land, under 2 Revised Statutes, 512. The remedy is by certiorari. 1858, *Romaine v. Kinshimer*, 2 *Hill.*, 519; overruling *Davis v. Hudson*, 5 *Abbotts' Pr.*, 63.
6. *It seems*, that an order striking out an answer and directing judgment for the plaintiff, does not belong to the class of appealable orders embraced by section 349 of the Code; it is rather the judgment in the action, reviewable only on appeal from the judgment when perfected. [10 *How. Pr.*, 218.] *Supreme Ct.*, 1859, *Harris v. Hammond*, 18 *How. Pr.*, 123.
7. An order granting leave to file a sufficient bond for costs, in opposition to a motion to dismiss the complaint for the insufficiency of the original bond, is not appealable. *Supreme Ct.*, 1859, *Tyrone and Lock Haven Railroad Company v. Schenck*, 18 *How. Pr.*, 275.
8. In what cases an order refusing to allow an amendment of the pleadings is appealable as involving the merits, or affecting a substantial right. *Salters v. Genin*, *Ante*, 478.
9. An order making an allowance to the wife, pending an action for divorce, is not appealable. *Moncrief v. Moncrief*, *Ante*, 315.
10. Where discretion is vested in a court or judge, the refusal to exercise that discretion, on the ground of want of power, is error of law, and a ground of appeal. [14 *East*, 395.] 1859, *Russell v. Conn*, 20 *N. Y. (6 Smith)*, 81.
11. An order of the Supreme Court, dismissing an appeal from the special term, on the ground that it was taken too late, is appealable to the Court of Appeals, as "determining the action." [Code, § 11.] 1859, *Bates v. Voorhees*, 20 *N. Y. (6 Smith)*, 525.
12. On appeals from such orders, the facts as well as the law of the case are open to review in the Court of Appeals. *Ib.*
13. A petition of appeal from an order of the surrogate assuming to settle the accounts of the guardian upon such a petition, need not specify the items. *Banks v. Taylor*, *Ante*, 199.
14. Section 348 of the Code—providing that an appeal from a judgment, entered upon the direction of a single judge to the general term, does not stay the proceedings upon such a judgment, unless security be given as upon an appeal to the Court of Appeals, or the court or a judge thereof shall so order—extends to requiring a copy of the undertaking to be served as directed in section 340. If the undertaking

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- is not filed until after notice of appeal, the security is not deemed as having been given. [10 How. Pr., 344; 11 Ib., 139; 13 Ib., 402.] *Supreme Ct., Sp. T.*, 1859, *Smith a. Heermance*, 18 How. Pr., 261.
15. Section 268 of the Code, amended by adding at the end: No finding of facts by the general term shall be required for the purpose of review in the Court of Appeals; and if the judgment be reversed at the general term, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and in that case the question whether the judgment should have been reversed either upon questions of fact or of law, shall be open to review in the Court of Appeals. The provisions of this section, and also of section 272, as they are hereby amended, shall apply to appeals now pending, as well as to those hereafter brought. *Laws of 1860*, 786, ch. 459, § 9.
16. Appeals which prevent the issuing of letters testamentary, or of general administration, have preference in the Court of Appeals over all except criminal cases, and may be moved out of their order. *Laws of 1860*, 270, ch. 167, § 2.
17. *It seems*, that service of notice of judgment on an attorney who has given an unauthorized notice of appearance, should not be held to limit the time of appeal. [6 Johns., 296.] 1859, *Bates a. Voorhees*, 20 N. Y. (6 Smith), 525, 529.
18. Under section 174 of the Code—empowering the court to allow any act to be done after the time limited for the purpose—the court (though not a judge) may, after the time allowed by section 332 to appeal has elapsed, grant to a party leave to appeal. [Approving *Haase a. Central Railroad Company*, 14 How. Pr., 430; and disapproving *Enos a. Thomas*, 5 Ib., 361; and *Sherman a. Wells*, 14 Ib., 522.] *Supreme Ct., Sp. T.*, 1857, *Toll a. Thomas*, 18 How. Pr., 324.
19. On an appeal from a judgment rendered, upon books of account as evidence, if it is claimed that the books failed to prove the account, they should be brought before the appellate court, or it will be presumed that they were sufficient. *Gen. T.*, 1859, *Tomlinson a. Borst*, 30 Barb., 42, 47.
20. An appeal from the judgment only, presents only questions of law. 1858, *Bedell a. Commercial Insurance Co.*, 3 Bosw., 147.
21. Judgment based on conflicting evidence not to be set aside. *Hall a. Morrison*, 3 Bosw., 520.
22. Exceptions not noticed in counsels' points, nor argued, are deemed to be waived. *Cummings a. Morris*, 3 Bosw., 560.
23. Where a judgment, which should have been for the plaintiff, with nominal damages, leaving him subject to the costs, is erroneously

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ordered for the defendant, the error is too trifling to be corrected on appeal. 1859, *M'Conihe a. New York and Erie Railroad Co.*, 20 *N. Y.* (6 *Smith*), 495.

24. On appeal from an order granting a new trial, the Court of Appeals will not reverse the order, if the case shows that a question of fact was involved in the decision of the special term, and that the order for a new trial *may* have proceeded on the ground that such question was wrongly determined. [19 *N. Y.*, 207.] 1859, *Miller a. Schuyler*, 20 *N. Y.* (6 *Smith*), 522.

25. A merely formal error, which ought to have been amended on the trial, without imposing terms, must be disregarded on appeal. [Code, § 176.] 1859, *Bank of Havana a. Magee*, 20 *N. Y.* (6 *Smith*), 355.

26. Where a reference was ordered to report facts on a motion (Code, § 271, subd. 3),—*Held*, on appeal from the decision, 1. That the question of law arising on the facts as found, might be reviewed on appeal without exceptions:

2. That any question not depending on the facts found, as in the proceedings at the trial, or on the determination of the facts, must be raised by exceptions:

3. That the Court of Appeals could not review the correctness of the determination of the facts. 1859, *Marshall a. Smith*, 20 *N. Y.* (6 *Smith*), 251.

27. When a case, on appeal from a trial by the court, contains no statement of the conclusions of fact found, the Court of Appeals will construe the evidence most favorably for the support of the decision. 1859, *Viele a. Troy and Boston Railroad Co.*, 20 *N. Y.* (6 *Smith*), 184.

28. On a verdict taken subject to the opinion of the court, the court were of opinion that a part of the recovery was groundless, and ordered a new trial, unless the parties would consent to a reference, to ascertain the damages exclusive of that part of the claim. The parties did so consent, and the reference was had and report made, and the report confirmed, by order, at special term, and judgment entered thereon.

Held, that an appeal from such order and judgment brought the case before the general term, pursuant to the direction given at the trial, except that the court would now be aided by the determination of the referee. 1858, *Woodruff a. Commercial Insurance Company*, 2 *Hill*, 130.

29. Where the same evidence on which the referee finds for the plaintiffs upon the question of title, supports the conclusion that the chattels were not in defendant's possession, the court on appeal will assume that no demand was necessary. If the defendant desires to raise the

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- question, he should procure a specific finding thereupon. *N. Y. Car Oil Co. v. Richmond*, *Ante*, 185.
30. The practice of decreeing performance, at the suit of the purchaser, notwithstanding defects in title, should be very cautiously adopted; and where such relief was not asked at the trial, it cannot be granted on appeal, *Mills v. Van Voorhies*, *Ante*, 152.
31. Judgment should not be reversed for technical error in admission of evidence which could not have affected the result. *Lowery v. Steward*, 3 *Bosw.*, 505.
32. The fact that counsel was not fully prepared to argue the appeal, or that he believes the court did not fully understand the questions, is not ground for allowing a rehearing, nor for allowing an appeal to the Court of Appeals. 1858, *Drucker v. Patterson*, 2 *Hill.*, 135.

COSTS, 10; JUSTICE'S COURT, *tit. Appeal*.

APPEARANCE.

A letter signed by an attorney, as attorney for defendant, pointing out an irregularity in the summons, and offering to waive it and receive service of complaint, is an appearance. [9 *How. Pr.*, 445; 3 *Cai.*, 133.] *Sp. T.*, 1860, *Pignolet v. Daveau*, 2 *Hill.*, 584.

ARBITRATION.

Arbitrators, being appointed to decide upon a claim for damages to land, proceeded to examine the premises, and heard the statements of witnesses, who were not sworn, and whose evidence was not reduced to writing—all in the absence of one of the parties, and without his knowledge, the other being present, and the award was made in accordance with the testimony so given,—*Held*, that the award was invalid, although it was not shown that the arbitrators intentionally violated their duty, and it seemed probable that they acted under mistaken views of duty. [6 *Ves.*, 70.] *Knowlton v. Mickles*, 29 *Barb.*, 465.

ARREST.

1. One who, in collecting a claim of his own, unites with it a claim belonging to another creditor, under an agreement with the latter to account to him for a due proportion of the amount collected—receives such proportion in “a fiduciary capacity,” and is liable to arrest in an action for not paying it over. *Hall v. McMahon*, *Ante*, 319.
2. An agent who receives goods to sell on commission, who afterwards claims to have bought them from his principal, and on that ground

ARREST.

refuses to account, or return the goods, may be treated as having converted them. 1858, *Solomon a. Waas*, 2 *Hilt.*, 179.

3. When concealment of insolvency may be fraudulent. [Distinguishing *Nichols a. Pinner*, 18 N. Y., 295.] 1859, *Brown a. Montgomery*, 20 N. Y. (6 *Smith*), 287, 293.
4. An action for deceit, in falsely representing the pecuniary liability of another party, is not a case in which defendant can be arrested on the ground of fraud in contracting the debt or incurring the obligation on which the action is brought, under subdivision 4 of section 179 of the Code. That provision relates to actions on contracts. *Sp. T.*, 1859, *Smith a. Corbiere*, 3 *Bosw.*, 634.
5. The Code has not changed the rule that a husband can be arrested for the tort of his wife. [Disapproving 2 *Duer*, 613.] 1858, *Solomon a. Waas*, 2 *Hilt.*, 179.
6. Where the right to arrest is derived from the nature of the action, the defendant cannot, on motion to discharge from arrest, introduce affidavits to show that no cause of action exists. [4 *Abbotts' Pr.*, 103.] 1858, *Soloman a. Waas*, 2 *Hilt.*, 179.
7. The defendant in an execution—a foreigner—was informed by the officer who levied upon his property, that certain articles which among others he produced to the officer, were exempt from seizure on execution, and he, thereafter, removed them openly from the State.

Held, that these circumstances did not amount to removing and secreting property with intent to defraud creditors, within the meaning of the non-imprisonment act. *Krauth a. Vial*, *Ante*, 139.

8. A judgment-debtor was arrested under the "Act to abolish imprisonment for debt, and to punish fraudulent debtors" (*Laws of 1831*), for unjustly refusing to apply his property to the payment of the judgment. In order to avoid imprisonment, he gave a bond with sureties, conditioned that he would "within thirty days apply for an assignment of all his property, and for a discharge as provided in section 12 of said act, and diligently prosecute the same," until he should obtain his discharge. He prepared an inventory, &c., and gave due notice of an application accordingly to the county judge of his county, and duly appeared at the judge's office, prepared to proceed; but the judge was sick, and out of the county, and there was no other officer in the county authorized to hear the application, wherefore it was not made within the thirty days prescribed. In an action against the sureties upon the bond;

Held, 1. That the debtor was bound to continue the proceedings before any officer that was authorized to continue them, and who could be found in time.

ASSESSMENT.

2. That in fixing the day of application at nearly the end of the thirty days, he took upon himself the risk of delay in finding an officer qualified to proceed.
3. That he might, and was bound to have applied to the county judge of a neighboring county to continue the proceedings. [2 Rev. Stat., 3d ed., 284, § 58.]
4. That the bond was forfeited. 1859, Cobb *a. Harmon*, 29 *Barb.*, 472.
9. An application, which may be the foundation of an arrest, should be verified. Kelly's Application, *Ante*, 208.

ASSESSMENT.

1. Of the requisites of a petition to vacate an assessment, for fraud or irregularity, under the act of 1858. Matter of Keyser, *Ante*, 481.
2. An assessment set aside for a fraudulent alteration of the surveyor's return. Matter of Beekman, 18 *How. Pr.*, 460.

ASSIGNMENT.

1. Proper mode of assignment by a corporation of a bond and mortgage. Hoyt *a. Shelden*, 3 *Bosw.*, 267.
2. A party who sues as assignee cannot maintain his title by proof of an assignment made after suit brought. 1858, Garrigue *a. Loescher*, 3 *Bosw.*, 578.
3. Liability of assignee of lease, upon covenant for payment of rent. Young *a. Peyser*, 3 *Bosw.*, 308.
4. Assignments for benefit of creditors to be acknowledged and recorded; an inventory to be made; assignees are to give bond, and may be cited to account. *Laws of 1860*, 594, ch. 348.
5. An assignment for benefit of creditors by a manufacturing corporation, reciting that it is indebted in sums which it is unable to pay, is void. [15 *Barb.*, 62.] *Sp. T.*, 1859, Loring *a. United States Gutta Percha Co.*, 30 *Barb.*, 645.
6. One partner in a firm went to Europe, leaving a power of attorney of a very general nature with another partner. During his absence, the firm becoming insolvent, the remaining partners executed a general assignment for the benefit of creditors, with preferences. An action was brought by a subsequent judgment-creditor to set aside the assignment for his own benefit.

Held, 1. That the plaintiff, seeking only to obtain a legal preference for himself, was not entitled to any peculiar favor in equity.

2. That the assignment was valid, until objected to by the absent

ATTACHMENT.

partner, and he was therefore a necessary party plaintiff in an action to set it aside.

3. That he having been informed of the assignment, and in his reply not objecting to it, he would be presumed to have adopted it. *I. Dist.*, 1859, *Robinson v. Gregory*, 29 *Barb.*, 560.

7. An assignment for benefit of creditors, made by one partner without the concurrence of acting partners, of all the property of the firm, giving preferences, is void. *Pettie v. Orser*, 18 *How. Pr.*, 442.
8. An assignment by one of two partners, of all *his* right and interest in a partnership demand will not enable the assignee alone to maintain an action on the demand. 1858, *Mills v. Pearson*, 2 *Hilt.*, 16.
9. An assignment for the benefit of creditors, directed the assignee "to sell, dispose of, and convey the said real estate and personal property at such time or times, and in such manner, as shall be most conducive to the interests of the creditors of the said party of the first part, and convert the same into money as soon as may be consistent with the interests of said creditors."

Held, that the assignment was void, as tending to delay creditors. *Jessup v. Hulse*, 29 *Barb.*, 539.

10. An insolvent debtor in making a general assignment, has no power to do more than select his assignee, and direct the order of the application of his property, and the payment of his debts. Any thing more than this is an illegal delay of creditors. [17 *N. Y.*, 9; 3 *Kern.*, 215; 2 *Seld.*, 510; *Ib.*, 522; 23 *Barb.*, 63; 8 *How. Pr.*, 468; 9 *Barb.*, 255; distinguishing *Kellogg v. Slauson*, 1 *Kern.*, 302.] *Ib.*
11. Where the statute prohibits an assignment for benefit of creditors, such an assignment if made without preferences, will not be set aside at suit of one creditor, to enable him thus to obtain a preference. *Greene v. Breck*, *Ante*, 42.
12. A cause of action for a conversion of personal property,—*e. g.*, promissory notes,—may pass by a general assignment for benefit of creditors. 1859, *Whittaker v. Merrill*, 30 *Barb.*, 389.

ATTACHMENT.

1. Section 229 of the Code,—regulating the issue of attachments as provisional remedies,—amended by adding at the end: It shall be the duty of the plaintiff procuring such warrant, within ten days after the issuing thereof, to cause the affidavits on which the same was granted, to be filed in the office of the clerk of the county in which the action is to be tried. *Laws of 1860*, 785, ch. 459, § 7.
2. An affidavit to procure an attachment, which states enough to make

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it appear that a cause of action exists against the defendant, specifying the amount of the claim, and the grounds thereof, and that defendant is not a resident of this State,—is sufficient. 1859, Gould *a. Bryan*, 3 *Bosw.*, 626.

3. An action on an award for labor, &c., performed mostly in Canada, under contracts made, executed, delivered, and payable there, by virtue of a bond of arbitration there made, and a submission there had, must be regarded as an action on a foreign debt; in other words, not a cause of action arising within this State, within the provisions of the Code relative to attachments against foreign corporations. *Supreme Ct.*, 1858, Campbell *a. Champlain and St. Lawrence Railroad Co.*, 18 *How. Pr.*, 412.
4. Defendants, when called upon to give security for their debt to the plaintiff, stated that if the demand were sued, they would make an assignment; and that they owed a large amount of confidential debts which they should first provide for.

Held, that this was no evidence that they were about to dispose of their property with intent to defraud creditors, and that an attachment granted solely on this fact must be vacated. *Dickenson a. Benham*, *Ante*, 390.

5. A non-resident debtor having shipped goods to his factor within this State, a creditor issued an attachment, under the Code of Procedure, against the property of the debtor, and served the same on the factor after the bills of lading were received, but before the goods had come within the county. The factor at the time was largely in advance of the consignor, but he had in hands goods, and notes received for goods sold, to an amount exceeding the attachment, the proceeds of which, together with the proceeds of goods represented by the bills of lading, which latter subsequently arrived, were more than enough to pay his balance. After the latter goods had arrived and the balance of account turned in favor of the debtor, another creditor issued a similar attachment, and served it upon the same factor.

Held, that as between these creditors the first attachment was entitled to priority of payment. There was property of the defendant in goods and notes, in the hands of the factor at the time of the attachment, and the factor alone could assert his lien to the defeat of the attachment, and the amount of his lien having been subsequently paid, the surplus was left bound by the attachment. *Patterson a. Perry*, *Ante*, 82.

6. *It seems*, that the fact that since the attachment has been levied, the defendants have assigned their interest in the property attached, does not affect their right to move for a discharge of the attachment for in-

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- sufficiency in the papers on which it was granted. *Dickenson v. Benham, Ante, 390.*
7. A non-resident, though he is a citizen of another State, cannot proceed by attachment against a foreign corporation. *Supreme Ct., Sp. T., 1858, Campbell v. Champlain and St. Lawrence Railroad Co., 18 How. Pr., 412.*
 8. An attachment against the property of a non-resident defendant may be issued and accompany the summons into the hands of the sheriff, and may be served after the summons has been duly, personally served; and an attachment so issued and served is regular and valid. 1859, *Gould v. Bryan, 3 Bosw., 626.*
 9. A debt due, by a foreign corporation which has no agency in this State, to a non-resident of this State, is not the subject of attachment as a provisional remedy under the Code, in an action by third parties against the non-resident. *Willet v. Equitable Insurance Company, Ante, 193.*
 10. *It seems*, that whatever may be taken on execution, may be taken on an attachment issued under the Code of Procedure. *Patterson v. Perry, Ante, 82.*
 11. *It seems*, that a bill of lading in the hands of the consignee is not property of the consignor within the meaning of section 464 of the Code. *Ib.*
 12. Under 2 Revised Statutes (5th ed.), 89, § 71, the course of the trustees under an attachment against absent and absconding debtors in distributing the proceeds, is ministerial, and to be conducted under direction of the court. A certiorari to review these proceedings is not necessary. *Supreme Ct., Sp. T., 1859, Matter of Bonaffe, 18 How. Pr., 15.*
 13. Of the effect of the provisions of the *Code de Commerce* of France, respecting a *concordat* or discharge in bankruptcy. *Ib.*

AMENDMENT, 1.

ATTORNEY.

1. The Legislature have no power to confer upon any other body than the Supreme Court the right and power of ascertaining and determining the qualification and admission of candidates for the bar. *Matter of the Graduates, Ante, 348.*
2. After the attorney has paid over the proceeds of the action to the plaintiff, without notice of the claim of the next friend, he will not be held liable to reimburse to the next friend expenses incurred by the latter. *Leopold v. Meyer, Ante, 40.*

ATTORNEY-GENERAL.

3. Where plaintiff's attorney consented to open a default which he had obtained ;—*Held*, that the case being one in which the court would have opened the default, the act of the attorney in consenting to its being opened, was not of itself negligence which would preclude him from recovering for his services. 1858, *Chessman v. Merkel*, 3 *Bosw.*, 402.

ATTORNEY-GENERAL.

The attorney-general may maintain an action in the name of the People to restrain a municipal corporation from exercising authority not possessed by it under its charter or by law. *People v. Mayor, &c.*, of New York, *Ante*, 144.

BAIL.

1. Where bail that the sheriff has accepted fail to justify, the sheriff becomes liable as bail to the action, and his liability is commensurate with that of any other bail. *Metcalf v. Stryker*, *Ante*, 12.
2. *It seems*, that it would be otherwise with the case of mere bail upon mesne process, or on surrender. *Ib.*

BILLS, NOTES, AND CHECKS.

1. One who purchases a note or bill, drawn, indorsed, or accepted by a manufacturing corporation, cannot, without inquiry into their authority to make, or the authority of their officer or agent to bind them by, such a contract, rely on the mere fact of the drawing, indorsing, or accepting, and claim to be regarded as a *bona-fide* holder for value, without any reference to the question of actual consideration, or to that of the authority of the officer or agent. *Farmers' and Mechanics' Bank v. Empire Stone-Dressing Co.*, *Ante*, 47.
2. One who discounts a bill for value and without notice, before acceptance, though he becomes thereby a *bona-fide* holder as against the drawer, does not thereby become a *bona-fide* holder for value as against the subsequent acceptor. *Ib.*
3. Discounting a bill in the expectation that it will be accepted as previous similar bills had been, is not discounting it on the faith of an acceptance. *Ib.*
4. A due-bill is a promissory note, within the statute. [10 *Wend.*, 675 ; 2 *Cow.*, 536.] 1859, *Sackett v. Spencer*, 29 *Barb.*, 180.

BROKER.

BROKER.

A broker who, being employed to purchase stock, in good faith and in accordance with the custom of the market, makes the purchase in his own name, and transfers the stock bought to his principal, is not liable to the principal if the stock prove to be spurious. *Peckham v. Ketchum, Ante*, 220.

CARRIER.

Of the power of carriers of passengers to restrict their liability by a contract. *Boswell v. Hudson River Railroad Co., Ante*, 442.

COUNTER-CLAIM, 3.

CASE.

1. The case, on appeal from a decision by a judge or referee, should contain a statement of facts found, distinguished from his conclusions of law. Where no such statement was included in the case, but a paper was annexed to it, entitled "statement of facts," not signed, or in any way authenticated, the Court of Appeals treated it as authentic, particularly as against the appellant. 1859, *M'Mahon v. New York and Erie Railroad Co.*, 20 *N. Y.* (6 *Smith*), 463.
2. A case on appeal to the Court of Appeals should present, with legal and logical precision, the questions which are to be examined in that court, and should contain nothing else. 1859, *Bissel v. Hamlin*, 20 *N. Y.* (6 *Smith*), 519.
3. A statement of the facts proved, and of the conclusions of law, separately, must be inserted *in the case*. [16 *N. Y.*, 610; *Ib.*, 613; *Ib.*, 617; 3 *Kern.*, 344.] *Ib.*
4. The report of a referee (although required by rule 32 of the Supreme Court to state his conclusions of fact and of law separately), will not be accepted by the Court of Appeals as a substitute for a case. *Ib.*
5. A case must not set out all the evidence in full. *Ib.*
6. Where an appeal is taken from a *second* trial, the proceedings on the *first* trial should not be inserted in the case. *Ib.*
7. An appeal dismissed, for violation of the above rules. *Ib.*
8. Though a case or exceptions be not filed within ten days as required by rule 37, the court will in a proper case allow it to be afterwards done. *Peck v. New York and Liverpool Steamship Company*, 3 *Bosw.*, 622.
9. Amendments to a case must be proposed, not by offering an amended case, but by marking on the original case each passage to which an

CAUSE OF ACTION.

amendment is proposed, and writing the amendments either on the case, or on a separate paper with distinct references to the case. But in proper circumstances the court might grant leave to serve a substituted case. *Sp. T.*, 1859, *Stuart v. Binsse*, 3 *Bosw.*, 657.

10. Upon a motion for a new trial founded on a case, which motion was made before the judge who tried the cause, the case, as agreed upon by the counsel, stated a charge to have been made which was materially different from that which had been actually made by the judge.

Held, 1. That the charge should be stricken out of the case, and a correct account of the charge inserted.

2. That, as the judge still adhered to the views expressed in the charge as so stated, the motion should be denied. *Toplitz v. Raymond*, *Ante*, 60.

11. But exceptions which were contained in the case thus agreed on should not be stricken out, although the judge's notes of the trial did not mention that any such were taken. *Ib.*
12. After a cause has been heard and determined by the general term, and a statement of the facts found ordered to be annexed to the roll, and an appeal has been taken to the Court of Appeals, a resettlement of the case, and a restatement and refinding of the facts found by the referee, is not to be allowed. *Catlin v. Cole*, *Ante*, 387.
13. *It seems*, however, that a specific error or omission in the case might be corrected in a proper case. *Ib.*

APPEAL; EXCEPTION.

CAUSE OF ACTION.

1. An action lies upon a promise made by the defendant for a good consideration to a third person for the benefit of the plaintiff, although the plaintiff was not cognizant of the promise at the time. [4 *Cow.*, 432; *S. C.*, 9 *Ib.*, 639; 2 *Den.*, 45; 4 *Ib.*, 97; 1 *Johns.*, 140; 17 *Mass.*, 400; *Ib.*, 575; 7 *Cush.*, 340; distinguishing *Mellen v. Whipple*, 1 *Gray*, 317.] 1859, *Lawrence v. Fox*, 20 *N. Y.* (6 *Smith*), 268.
2. The law will imply a promise to refund money paid upon a judgment which has been subsequently reversed. 1859, *Garr v. Martin*, 20 *N. Y.* (6 *Smith*), 306.
3. But the implied promise is to the party against whom the judgment was erroneously taken, and not to a surety, although the latter may have actually paid the judgment. His remedy is only against his principal. *Ib.*, reversing *S. C.*, 1 *Hilt.*, 358.

CAUSE OF ACTION.

4. A party against whom a judgment has been rendered, and who has paid it, may recover the amount paid by action, after the former judgment has been reversed. 1859, *Lott a. Swezey*, 29 *Barb.*, 87.
5. Where money is paid into the hands of a public officer for the express purpose of being paid to a private individual, the latter may maintain an action against the former, for money received to the plaintiff's use. [7 *Hill*, 198; 6 *Cow.*, 465; distinguishing *Seaman a. Whitney*, 24 *Wend.*, 260.] 1858, *Murdock a. Aikin*, 29 *Barb.*, 59; 1859, *Roso a. Curtis*, 30 *Ib.*, 238.
6. By accepting goods under a bill of lading, the receiver becomes liable to pay the amount of freight specified therein to the carrier who actually delivered the goods. [Abbott on Shipping, 421; 5 *Taunt.*, 477.] 1859, *Merrick a. Gordon*, 20 *N. Y.* (6 *Smith*), 93.
7. One who, for a good consideration, transfers a chose in action, impliedly warrants, at the least, that there is no defence to the claim arising out of his own act. And if there is any such concealed defect, the purchasers, after proceeding at law to recover from the supposed debtor, and failing in the suit, may recover their costs from their assignor. 1859, *Delaware Bank a. Jarvis*, 20 *N. Y.* (6 *Smith*), 226.
8. Where a vendor of real estate, by virtue of a right reserved in the contract, elects to cancel the sale, the vendee may, in an action for money had and received, recover from him money which he has paid on account of the purchase. [12 *Johns.*, 274, 363; 9 *Cow.*, 46; 4 *Comst.*, 91; 1 *Greene* (Iowa), 380; 6 *Gill & Johns.*, 424; 15 *Mass.*, 319; 26 *Vermt.*, 476.] 1858, *Utter a. Stuart*, 30 *Barb.*, 20.
9. The grantee of an exclusive ferry privilege has a good cause of action against any other person who conveys passengers free of charge across the stream within the ferry limits. 1859, *Aikin a. The Western Railroad Corporation*, 20 *N. Y.* (6 *Smith*), 370.
10. The plaintiff hired a room for holding a public meeting, and paid for its use, and the defendants, with the design of preventing the meeting, took possession of the room and passed resolutions opposed to the object of the call, in consequence of which the plaintiff and his associates were unable to hold the meeting proposed.
Held, that the plaintiff might recover from defendants the expenses which he had incurred in preparation for the meeting. *Blunt a. Mott*, *Ante*, 222.
11. Plaintiff cannot recover in the courts of this State for a wrongful entry on and possession of real property in another State. [23 *Wend.*, 484.] He must sue for use and occupation under a contract. *Sp. T.*, 1859, *Hurd a. Miller*, 2 *Hill.*, 540.

CHATTEL MORTGAGE.

12. Principal held not liable to one employee for injury caused by negligence of another employee. *Karl v. Maillard*, 3 *Bosw.*, 591.
13. To sustain an action for a wrongful conversion of personal property, as distinguished from an action for loss through negligence of a bailee's duty, it is necessary for plaintiff to show affirmatively a wrongful detention after demand. A mere neglect to deliver upon demand, unless the goods are then in defendant's possession, does not work a conversion. 1859, *Whitney v. Slauson*, 30 *Barb.*, 276; and see *Lattimer v. Wheeler*, *Ib.*, 485.
14. Where personal property is mortgaged, with a clause providing that the mortgagee may take possession thereof, and sell it to satisfy the debt, at any time when he may deem himself insecure, an action to recover its value may be maintained upon its wrongful conversion, although the mortgage is not due by its terms. 1859, *Chadwick v. Lamb*, 29 *Barb.*, 518.
15. An action for the conversion of personal property can be maintained by one who has the right to the possession at the time of the conversion. [1 *Cowen's Tr.*, 2d ed., 284; 7 *How. Pr.*, 251.] 1859, *Chadwick v. Lamb*, 29 *Barb.*, 518.
16. Every continuance of a nuisance is a fresh cause of action. [3 *Black. Com.*, 220; 3 *Barb.*, 157; 1 *Den.*, 257; 10 *Mass.*, 74; 4 *Den.*, 317; 2 *Kern.*, 492.] 1859, *Beckwith v. Griswold*, 29 *Barb.*, 291.
17. The provisions of the acts of 1847 and 1849 (*Laws of 1847*, 575; *Laws of 1849*, 388)—giving an action to the personal representatives of persons killed by the act or neglect of others—do not extend to the case of a death caused without this State. *Beach v. Bay State Co.*, *Ante*, 71; and see *Whitford v. Panama Railroad Co.*, 3 *Bosw.*, 67.
18. Action by purchaser of stock of a corporation against director for false representations by which he was induced to purchase,—not sustained. *Mabey v. Adams*, 3 *Bosw.*, 346.
19. Of the implied promise raised by law upon a duty. *Scranton v. Booth*, 29 *Barb.*, 171.

ACTION; CLAIM AND DELIVERY; COMPLAINT; CREDITORS' ACTION; INJUNCTION, 5.

CHATTEL MORTGAGE.

The term "subsequent" in *Laws of 1833*, 402, § 3, means after the time of refileing has elapsed. [4 *Kern.*, 71.] 1859, *Latimer v. Wheeler*, 30 *Barb.*, 485.

CLAIM AND DELIVERY.

CLAIM AND DELIVERY.

1. The complaint was for wrongfully taking, carrying away, and converting to the use of the defendants, personal property; and the relief demanded was a judgment for fifteen hundred dollars besides costs.

Held, that the nature of the action was determined by the complaint, and particularly by the relief demanded, as an action for damages, and not to recover specific property; and that proceedings for claim and delivery were wholly unwarranted in the action, as such proceedings are confined to actions to recover the possession of personal property. *Supreme Ct., Sp. T.*, 1859, *Seymour v. Van Curen*, 18 *How. Pr.*, 94.

2. In proceedings of claim and delivery, if the defendant elect to hold the property, the officer is still to retain it until the sureties justify, unless, indeed, he is willing himself to take the risk of such justification. The effect of a demand of the property by the defendant is not to entitle the defendant to have the property delivered to him, but to prevent a delivery of the property to the plaintiff. If the defendant would have the property himself, he must proceed to have his sureties justify in the manner provided in section 212 of the Code. The time within which the defendant is to proceed to have his sureties justify, is not limited. It is enough for plaintiff, that the property is to be retained by the officer until such justification takes place, unless the officer chooses to make himself personally responsible that the sureties shall justify. *Supreme Ct., Chambers*, 1857, *Graham v. Wells*, 18 *How. Pr.*, 377.

CLERKS.

Hours during which county clerks and clerks of courts of record, and the register of deeds of the city and county of New York, are to keep their offices open. *Laws of 1860*, 480.

COMPLAINT.

1. A complaint is not bad, as stating no cause of action, merely because the relief demanded is wholly unwarranted by the facts stated. The court should grant such relief as the facts warrant. 1859, *Emery v. Pease*, 20 *N. Y. (6 Smith)*, 62.
2. A complaint is sufficient to sustain a judgment if, rejecting surplusage, a good cause of action can be collected. The fact that besides allegations appropriate to charge defendant, it contains allegations appro-

COMPLAINT.

- priate only to charge a third party, is not ground of nonsuit. 1859, *Winterson v. Eighth Avenue Railroad Co.*, 2 *Hill.*, 389.
3. A demand for judgment in the alternative is improper, and should be stricken out. *Durant v. Gardner*, *Ante*, 445.
 4. A demand for general relief is inconsistent with a demand for judgment in a specified sum in an action for a money-demand on contract, and should be stricken out. *Ib.*
 5. A receiver bringing an action, must state in his complaint the time and mode of his appointment, so that issue may be taken thereon. Describing himself as "having been duly appointed receiver of, &c., and bringing this suit by order of the Supreme Court," is insufficient on demurrer. [4 *Den.*, 80; 23 *Barb.*, 596; 5 *Duer*, 672; 13 *How. Pr.*, 413; 7 *Barb.*, 206; 3 *Kern.*, 83.] *Supreme Ct., Sp. T.*, 1859, *Dayton v. Connah*, 18 *How. Pr.*, 326.
 6. A complaint referring to an account, according to section 158 of the Code, for the particulars of the claim,—*e. g.*, in an action for work, labor, and services,—is nevertheless indefinite and uncertain, unless its allegations show the nature and character of the claim, and the period within which it arose. *Farcy v. Lee*, *Ante*, 143.
 7. Where the complaint on a bill against drawees, alleged that they had refused to accept, and that they had had a settlement of accounts with the drawers, and that on such settlement the drawers had left in the defendants' hands sufficient money to pay the bill which the defendants then agreed to pay,—*Held*, that the action must be sustained. [12 *Johns.*, 276; 1 *Ib.*, 139; 13 *Ib.*, 496; 17 *How. Pr.*, 289.] *Supreme Ct., Sp. T.*, 1859, *Mittenberger v. Atwood*, 18 *How. Pr.*, 330.
 8. A complaint on a note payable in merchandise, set forth the note, and averred that it was duly *indorsed* to the plaintiff by the payee, and that the plaintiff was the lawful *owner and holder* thereof.
Held, 1. That the complaint was defective in not alleging an *assignment* of the note.
 2. That the title to such a note could not pass by indorsement.
 3. That the averment of ownership, though argumentative, was sufficient on the trial to allow evidence of an assignment.
 4. That the remedy against such defects is by motion only. 1859, *Brown v. Richardson*, 20 *N. Y.* (6 *Smith*), 472.
 9. The complaint in an action by the mortgagor on a policy of insurance issued to him, but in terms payable to the mortgagee, must aver that the mortgage has been paid, or must join the mortgagee as a party. 1858, *Ennis v. Harmony Fire Insurance Co.*, 3 *Bosw.*, 515.
 10. In a complaint on a bond, it is not necessary to allege the loss of

COMPLAINT.

- the bond, in order to give secondary evidence of its contents. 1859, *Supervisors of Livingston v. White*, 30 *Barb.*, 72.
11. Such an allegation was required under the former system, because of the rules of proferet. But proferet is abolished by the Code. *Ib.*
 12. A complaint in an action upon a bond, for the breach of any condition other than for payment of money, must assign specific breaches, not only in the cases mentioned in 2 *Rev. Stat.*, 378, but also in all others. 1859, *Western Bank v. Sherwood*, 29 *Barb.*, 383.
 13. That a complaint on the bond of an executor or administrator which does not show unconditionally that the surrogate had jurisdiction to issue letters on the decedent's estate, is insufficient. *Mahony v. Gunter*, *Ante*, 431.
 14. V. having agreed with H. to render personal services in consideration of a certain compensation, part of which was to be paid monthly, and part at the end of the term, was taken sick and died, after having rendered a portion only of such services.
Held, 1. That the executor might recover the proportionate value of the services rendered, upon the special contract, by complaining upon it, and setting up the excuse for its non-performance.
 2. That he was not obliged to sue in that form, but might complain on a *quantum meruit*, leaving the defendant to allege the special contract. 1859, *Wolfe v. Howes*, 20 *N. Y.* (6 *Smith*), 197.
 15. Requisites of a complaint in an action by a trustee for instructions respecting the trust-fund arising under a railway mortgage. *Coe v. Beckwith*, *Ante*, 296.
 16. The complaint on an undertaking given on appeal to the Court of Appeals, alleged that the party appealed, and that upon said appeal the defendants "made and filed with the clerk of this court, for the use of the plaintiff," the undertaking in question, and that the appeal had been further prosecuted in the Court of Appeals, and the judgment appealed from affirmed there; but it did not state that the undertaking was accompanied by the affidavits of the sureties, as required by section 341 of the Code.
Held, on demurrer, sufficient. The undertaking is not a nullity without such affidavit, and the presumption is that the requirements of the Code were complied with. 1859, *Gibbons v. Bernhard*, 3 *Bosw.*, 635.
 17. In an action to charge stockholders personally with debts of their corporation, under a charter which provides that the stockholders shall be liable, etc., until the amount of capital stock has been paid in, the complaint must show that defendants were stockholders during the time the debts sued on were incurred. *Young v. N. Y. and Liverpool Steamship Co.* *Ante*, 229.

COMPLAINT.

18. Judgment-creditors of the corporation are not proper parties defendant in such an action, without showing why they were not made parties plaintiff. *Id.*
19. In a complaint in an action brought by an officer of a joint-stock company, the allegation that the company is a joint-stock company or association, consisting of more than seven shareholders or associates, is—under the act of 1849 relative to such suits—a material and issuable allegation. *Tiffany v. Williams, Ante, 204.*
20. A complaint for money received by an agent, as such, who pretends to have been robbed thereof, may properly allege simply that the defendant being in possession of the plaintiff's property, as his agent, converted the same to his own use. 1859, *Frost v. M'Cargar, 29 Barb., 617.*
21. The plaintiff cannot, upon a complaint charging a conversion of personal property after its assignment to him, recover for a conversion before its assignment. The case is not that of a variance, but the causes of action are entirely distinct. 1859, *Whittaker v. Merrill, 30 Barb., 389.*
22. In an action by a mortgagee of chattels against one who has wrongfully taken them, it is not necessary to allege in the complaint that the mortgage was filed, nor that plaintiff made demand before suit. *Sp. T., 1858, Moses v. Walker, 2 Hill., 536.*
23. In an action for malicious prosecution, the complaint may aver matter tending to show the defendant's motive—*e. g.*, a malicious publication by him procured to be made concerning the prosecution—such as would be proper to aver at the trial, as showing special injury. Such averments should not be struck out on motion, as the plaintiff cannot be deemed aggrieved by them. *Brockleman v. Brandt, Ante, 141.*
24. Where one of a board of public officers, at a meeting of the board—while a resolution was pending recommending the employment of the plaintiff—declared that he knew that the plaintiff was the author of an obscene caricature, which had been published to ridicule one of the official acts of the board, and which was also a libel upon individuals,
 - Held, 1.* That the charge was pertinent to the subject under discussion, and was conditionally privileged.
 - 2.* That, to entitle the plaintiff to maintain an action for defamation, he must establish that the charge was made without reasonable or probable cause.
 - 3.* That the defendant having declared that he knew that the plaintiff was the author of the caricature, without indicating what he relied upon for making the assertion, an averment in the complaint that

COMPLAINT.

the plaintiff was not the author, and had no complicity therein, was sufficient, *prima facie*, to show that there was a want of probable cause. *Viele v. Gray, Ante*, 1.

25. Where the occasion upon which the words are spoken repels any presumption of malice, and proof of it is necessary to maintain the action, it is sufficient to aver that they were spoken maliciously, without setting forth, in the complaint, the facts and circumstances which show the existence of malice. *Ib.*

26. A complaint in an action for deceit—*e. g.*, for falsely misrepresenting the value of stock in a corporation—must allege knowledge or an intent to deceive on defendant's part. Alleging that he "falsely and fraudulently represented" a thing to be what it is not, is not enough. 1858, *Mabey v. Adams*, 3 *Bosw.*, 346.

Requisites of a complaint against a director, for fraudulent representations which induced plaintiff to purchase stock. *Ib.*

27. After an action and recovery for erecting a nuisance, a second action was brought upon the same ground, it having been continued meanwhile. The complaint in this action set forth the erection of the nuisance without any reference to the former action.

Held, 1. That the former recovery was not a bar to the action.

2. That the complaint was sufficient, though it would have been better to refer to the former action, and to state that the damage complained of was only for such as had accrued since the former recovery. [Yates' Pl., 251; 2 Chit. Pl., 333.]

3. If the complaint was defective, it was a proper case for an amendment on the trial. [Code, §§ 173, 176; 4 *Kein*, 251; *Ib.*, 506; 2 *Smith*, 250; 3 *Ib.*, 224; 15 *How.*, 399; 26 *Barb.*, 359.] 1859, *Beckwith v. Griswold*, 29 *Barb.*, 291.

28. In an action against a sheriff for breach of duty in the execution of process which he received, it is not necessary that the complaint should show the several steps in the action on which the mere regularity of the process depends. It is enough, after showing jurisdiction to issue the process, to allege that it was duly issued. *French v. Willet, Ante*, 99.

29. In an action by the commissioners of excise, the complaint stated the individual names of the plaintiffs, describing them as such board of commissioners, and alleging that the penalty accrued to them as such.

Held, That the action was properly brought. *Supreme Ct.*, 1859, *Hait v. Benson*, 18 *How. Pr.*, 302.

30. Of the liability of a married woman, on a complaint seeking to charge her separate estate with a note indorsed by her. *Sexton v. Fleet*, 2 *Hill*, 477.

COMMON LAW.

31. In a complaint which seeks to set aside an assignment on account of provisions which make it fraudulent on its face, it is sufficient, and (*it seems*) unexceptionable pleading to allege that the instrument was made to hinder, delay, and defraud creditors, and is therefore fraudulent and void. It is not necessary to point out in the pleading the particular features or clauses of the instrument which are objected to. Those are matters of evidence. 1859, *Jessup v. Hulse*, 29 *Barb.*, 539. To the same effect is *Hastings v. Thurston*, *Ante*, 418.
32. In an action *in rem*, founded on the claims of plaintiff as a creditor—*e. g.*, an action to reach and distribute the assets of a limited partnership—the allegations of the complaint to show that the plaintiffs are creditors, must be so definite and specific, as to inform the defendants when, in what manner, and by what contracts it is claimed that they became indebted to the plaintiffs. *Gray v. Kendall*, *Ante*, 66.
33. In an action by judgment-creditors to set aside an assignment, the complaint charged fraud in the assignment, and mismanagement on the part of the assignees, and demanded that it be adjudged void; and whether it be adjudged void or not, that the assignees make discovery of the assets, and account therefor.
- Held*, That the court would not grant a motion to compel plaintiffs to elect which relief they would pursue—to avoid the assignment, or to claim under it. Such a complaint states but one cause of action, and the court should determine the question as to the relief at the trial. 1858, *Redmond v. Dana*, 3 *Bosw.*, 615.
34. A complaint by the mortgagee in a mortgage which contained no covenant to pay the sum secured, seeking to charge the mortgagor with a deficiency, on the ground of fraud and breach of a promise not to cut timber, &c.,—*Held*, insufficient. *Vrooman v. Dunlap*, 30 *Barb.*, 202.

ACTION, 2; CORPORATION, 8; CREDITORS' ACTION, 4; JOINDER OF ACTIONS, 1.

COMMON LAW.

This State has adopted the *principles* of the common law, rather than the strict rules laid down by it. *Per* JAMES, J., 1858, *Morgan v. King*, 30 *Barb.*, 9.

CONFESSION OF JUDGMENT.

AMENDMENT, 6, 10; JUDGMENT, 13-22.

CONSIGNOR AND CONSIGNEE.

The right of a consignee, in advance to his consignor, to property on hand or to a bill of lading made in his name, is a qualified property

CONSTITUTIONAL LAW.

commensurate with, and to support his lien, and no more. *Patterson a. Perry, Ante, 82.*

CONSTITUTIONAL LAW.

1. The Legislature has no power to create a new county where the boundaries of such county divide an assembly district, or include parts of different judicial or senate districts. 1859, *Lanning a. Carpenter, 20 N. Y. (6 Smith), 447.*
2. The act to organize the county of Schuyler (*Laws, 1854, ch. 386*), was unconstitutional. *Ib.*
3. The governor of this State may sign bills of which he approves, after the Legislature has adjourned. 1859, *People a. Bowen, 30 Barb., 24*; affirmed in *Ct. of Appeals, June, 1860.*
4. The act "to incorporate the Metropolitan Gas Light Company of the city of New York," is constitutional in all respects. *Ib.*
5. The act of April 6, 1860 (*Laws of 1860, ch. 187*)—providing that any graduate of the Law Department of the University of the city of New York, shall be admitted, upon his diploma, to practise—is unconstitutional. *Matter of the Graduates, Ante, 348.*
6. The Legislature has power to give a new remedy for the enforcement of contracts already made. 1859, *Hauptman a. Catlin, 20 N. Y. (6 Smith), 247.*

CONTEMPT.

The defendants will not be punished for contempt for disobeying an injunction order in supplementary proceedings founded on affidavit which does not truly describe the judgment. *Kennedy a. Weed and Wife, Ante, 62.*

CONTINUANCE.

Upon the death of a defendant, it is not absolutely necessary that the application for a continuance be made within a year; but the court may order a continuance, if within the year, upon a simple motion—if after the year has elapsed, then on a supplemental complaint. *Allen a. Walter Ante, 379.*

CONTRACTS.

Of the liability of a corporation, and the exemption from liability of its committee, on a contract on behalf of the corporation, made by the committee under their own seals. *Haight a. Sahler, 30 Barb., 218.*

CORPORATION.

CORPORATION.

1. A corporation created by the laws of this State is deemed a resident thereof, although the bulk of its property and business lies in a foreign State. [13 Peters, 519; 14 Ib., 129; 2 How. (U. S.), 499.] 1859, *Crowley v. Panama Railroad Co.*, 30 Barb., 99.
2. Whatever may be the powers of a corporation created by prescription, a corporation created by a legislature has no other powers than those expressly granted to it, and such as are necessary to carry into effect those that are expressly granted. [15 Johns., 358; 2 Cow., 678.] *Sp. T.*, 1859, *Boyce v. City of St. Louis*, 29 Barb., 650.
3. Where the charter of a corporation specifies the objects for which it may hold real estate, and does not include a trust for charitable purposes, such corporation cannot take real estate on such a trust. [See 8 Johns., 422; 15 N. H., 317.] *Ib.*
4. The city of St. Louis has not power to hold lands on such a trust. *Ib.*
5. The by-law of a corporation, authorizing its officers "to accept bills of exchange in the prosecution of the business of the company," is no authority for making an accommodation acceptance. *Farmers' and Mechanics' Bank v. Empire Stone-Dressing Co.*, *Ante*, 47.
6. An action of ejectment cannot be brought in the name of a corporation by persons claiming to be its legal trustees, against persons who also claim to be its legal trustees, and who hold the land only as such. It is not proper, in such an action, to decide conflicting claims to office. [3 Johns., 115.] 1859, *Parish of Bellport v. Tooker*, 29 Barb., 256.
7. The trustees of a corporation should sue in the corporate name only. [3 Rev. Stat., 2d ed., 208; 1 Kern., 94.] 1859, *Bundy v. Birdsall*, 29 Barb., 31.
8. A corporation when suing, need not aver or prove its corporate existence, unless it be expressly averred that it is not a corporation. [13 How. Pr., 270.] 1859, *La Fayette Ins. Co. v. Rogers*, 30 Barb., 491.
9. A corporation whose agent without authority accepts a bill on them, which it was not competent for them to accept, are not rendered liable by the fact that the holder of the bill relying upon the acceptance, held the bill till maturity, instead of suing the drawers for non-acceptance. *Farmers and Mechanics' Bank v. Empire Stone-Dressing Co.*, *Ante*, 47.
10. The act of 1850 (*Laws of 1850*, 344)—prohibiting corporations from interposing the defence of usury—does not affect the contract in respect to other parties; but merely precludes the corporation and those in privity with them from avoiding it. *Hungerford's Bank v. The Potsdam and Watertown Railroad Co.*, *Ante*, 24.

COSTS.

11. One who enters into a contract with a corporation, is estopped from setting up in an action upon such contract, that the corporation was not legally formed. [3 Sandf., 170; 17 Barb., 378; 17 Ohio, 407.] 1859, *White a. Coventry*, 29 *Barb.*, 305.
12. Where a company has been defectively organized as a corporation, a subsequent act of the Legislature, treating it as a valid corporation, and changing its name, cures all defects. [9 Wend., 351; see 1 Kern., 102; 4 Ib., 336.] *Ib.*
13. Under section 12 of the act to incorporate manufacturing and other corporations, the trustees who have neglected to report are not personally liable for debts contracted after they ceased to hold office as such. *Quarry Co. a. Bliss*, *Ante*, 211.
14. Under section 12 of the act of 1848—to authorize the formation of corporations for manufacturing, &c., purposes—a trustee who is elected as such, subsequent to the neglect of the corporation to file the report required, is not thereby rendered liable for a debt previously contracted. *So held*, where the corporation subsequently to his election, and before any report was filed, gave their acceptances to the creditor, and the action was brought on such acceptances. *Shaler & Hall Quarry Co. a. Brewster*, *Ante*, 464.
15. An action founded on a violation of section 10 of 1 Revised Statutes, 589, relating to moneyed corporations, cannot be maintained by one who became owner of stock *after* the alleged violations. 1858, *Mabey a. Adams*, 3 *Bosw.*, 346.

COSTS.

1. In all actions for recovery of money, unless plaintiff recovers \$50 or more, defendant is entitled to costs of course. *So held*, where plaintiff's recovery was on a claim for \$750—but was reduced to less than \$50 by a counter-claim. [Code, § 304.] 1858, *Crane a. Holcomb*, 2 *Hilt.*, 269.
2. Under section 305 of the Code a defendant in an action for recovery of money, who unites in his answer with a co-defendant, is entitled to costs if the verdict or the report of a referee is in his favor and against the co-defendant. 1859, *Corbett a. Ward*, 3 *Bosw.*, 632.
3. Under section 306 of the Code as amended in 1851, costs are in the discretion of the court in all actions whatsoever in which the plaintiff fails to recover against *all* the defendants, and hence it is necessary for the *court* to determine whether the successful defendants shall or shall not have costs against the plaintiff,—entry of judgment for costs in such case without application to the court is irregular. *Supreme Ct.*, 1859, *Wilklow a. Bell*, 18 *How. Pr.*, 397.

COSTS.

4. A defendant not united in interest with his co-defendant,—*e. g.*, in an action for assault and battery,—is, if he unites with him in his defence, entitled to costs under section 305 of the Code. [5 Seld., 549.] *Supreme Ct.*, 1859, *Zink v. Attenburgh*, 18 *How. Pr.*, 108.
5. The second subdivision of section 306 of the Code, as amended in 1851, includes *all actions*, whether of a legal or equitable nature, where the circumstances mentioned in that clause of the section exist. Hence, in all actions, whether of a legal or equitable nature, where there are several defendants, not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them. The defendant is not in any case, in the circumstances specified, entitled to costs of course, but must apply to the court to award them; and a judgment entered of course is irregular. *Supreme Ct.*, 1859, *Bank of Attica v. Wolf*, 18 *How. Pr.*, 102; *Zink v. Attenburgh*, 18 *Ib.*, 108.
6. The construction of subdivision 5 of section 307 of the Code, considered. *Jackett v. Judd*, 18 *How. Pr.*, 385.
7. The action was founded on a note for \$186. The defence was, that the note was given on a settlement of accounts between the parties, in which a mistake of fact was made, which, if corrected, would show that the defendant did not owe the plaintiff any thing; but that the latter owed the former \$100. The total amount of the accounts settled exceeded \$2,000. They were all examined by the referee, who corrected the errors committed in the settlement made by the parties, and reduced the amount due the plaintiff, from that specified in the note, down to \$26.12.
Held, that the case was one in which a justice's court would have no jurisdiction, since the accounts, for the purposes of the trial, exceeded \$400; and the plaintiff was entitled to costs. *Supreme Ct.*, 1859, *Gilliland v. Campbell*, 18 *How. Pr.*, 177.
8. In an action by one claiming as assignee for benefit of creditors, the answer claimed that the assignment was void, and the judge dismissed the action on that ground.
Held, that it having been thus determined that the action was not brought by plaintiff as assignee or trustee of an express trust, he was not exempt from costs under section 317 of the Code. 1859, *Sibell v. Remsen*, 30 *Barb.*, 441.
9. In an action to redeem mortgaged premises, where it is found that nothing is due on the mortgage, it is proper to award costs against the mortgagee. 1859, *Calkins v. Isbell*, 20 *N. Y. (6 Smith)*, 147.

COSTS.

10. Whether the Court of Appeals can review the decision of the court below in regard to costs in an equitable action,—*Query? Ib.*
11. On the reversal of a judgment for defect of an indispensable party,—the objection not having been raised at the proper time by the defendant, no costs were allowed to either party for any proceedings. *Shaver a. Brainard, 29 Barb., 25.*
12. On motion for new trial upon a case made, only motion costs are allowed. *Supreme Ct., Sp. T., 1859, Jackett a. Judd, 18 How. Pr., 385.*
13. When on an appeal, neither party is entirely successful, neither should be allowed costs. 1859, *Pickett a. Barron, 29 Barb., 505, 509.*
14. The item allowed by the Code for proceedings after notice and before trial, is a part of the costs of the trial or hearing. [6 *How. Pr.*, 465, 265; 4 *Ib.*, 304; 5 *Ib.*, 336.] Hence where a party is required to pay "all the costs of the hearing before the referee," he is chargeable with this item. *Supreme Ct., Sp. T., 1859, Buckingham a. Minor, 18 How. Pr., 287.*
15. Dismissing a complaint, the plaintiff not appearing to oppose, is a trial, under section 309 of the Code, and the defendant may have an allowance therefor in a difficult and extraordinary case. *Rogers a. Degen, Ante, 313.*
16. Witnesses, who come from a distance at the request of parties, without subpoena, are entitled to the allowance for travelling expenses, and to the per-diem allowance provided by statute; but the per-diem allowance is to be restricted to the days during which the case is actually on the day-calendar of the court sitting for trials, and actually in session, and the witnesses are in attendance. If they attend on the like request in two cases, they are entitled to the full allowance in each case, though the parties may be the same. [19 *Wend.*, 82; 12 *How. Pr.*, 446; 4 *Sandf.*, 719; 16 *How. Pr.*, 306; 2 *Rev. Stat.*, 5th ed., 922, § 24.] *N. Y. Superior Ct., Sp. T., 1859, Vence a. Speir, 18 How. Pr., 168.*
17. A witness who actually attends in two cases between the same parties, is entitled to fees in both. *Hicks a. Brennan, Ante, 304.*
18. Facts requisite to be shown to entitle the prevailing party to tax fees for travel of witnesses. *Ib.*
19. Double costs cannot be allowed to an officer who has joined in a plea of justification with one who is not entitled to double costs. [2 *Cow.*, 426.] It is different where the officer and the other party answer separately. *Supreme Ct., Sp. T., 1859, Bradley a. Fay, 18 How. Pr., 481.*

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20. The provision of the Revised Statutes as to costs—giving double costs “to any other person,” in actions against him for any act done by the command of such officers, or in their aid and assistance—applies to third persons only who are called upon by the officer to assist him, and who have no connection with, or interest in the execution of the process, and are not parties to the action or proceeding in which the process originates; but does not entitle one who was a party to such action, and was acting solely in his own behalf, to recover double costs. *Supreme Ct., Sp. T.*, 1859, *Bradley v. Fay*, 18 *How. Pr.*, 481.
21. There was a recovery in the justice’s court against the defendant, who was a public officer, and defended his acts as such. He appealed to the county court, and the judgment was reversed. The plaintiff then appealed to the Supreme Court, where the judgment of the county court was affirmed.
Held [citing 17 *How. Pr.*, 1; 4 *Hill*, 546; 6 *How. Pr.*, 253], that the defendant was not entitled to double costs upon the appeal to the county court, but was entitled to double costs upon the appeal to the Supreme Court. *Supreme Ct.*, 1860, *Wheelock v. Hotchkiss*, 18 *How. Pr.*, 468.
22. Though there have been several trials, the item for all subsequent proceedings before trial can be allowed but once, when the issue has not been changed. [6 *How. Pr.*, 404, 408.] *Supreme Ct., Sp. T.*, 1859, *Jackett v. Judd*, 18 *How. Pr.*, 385.
23. The party entitled to costs, is to have them under and by virtue of the statute in force at the time the verdict is rendered. [3 *Den.*, 173; 4 *Wend.*, 210; 14 *How. Pr.*, 357, 279; 15 *Ib.*, 121, 156; 5 *Abbotts’ Pr.*, 219.] Where the first verdict was set aside, the costs are to be governed by the law existing at the time the final verdict is rendered. *Supreme Ct., Sp. T.*, 1859, *Jackett v. Judd*, 18 *How. Pr.*, 385; *Sp. T.*, 1860, *Jones v. Underwood*, 18 *Ib.*, 532.
24. It is not necessary to apply to the court, in the first instance, for double costs. The clerk may adjust them. Otherwise, in case of treble damages and treble costs. *Supreme Ct.*, 1860, *Wheelock v. Hotchkiss*, 18 *How. Pr.*, 468.
25. That liability for costs of a former suit does not prevent suing *in forma pauperis*. *Roberti v. Carlton*, 18 *How. Pr.*, 466.
26. Costs do not become a debt against a party to an action until judgment, unless he agrees to pay them. [3 *Den.*, 173; 14 *How. Pr.*, 300, 357.] If a settlement before judgment is without any provision for payment of costs, plaintiff loses them. [5 *Johns.*, 268.] 1859, *Warfield v. Watkins*, 30 *Barb.*, 395.

COUNTER-CLAIM.

COUNTER-CLAIM.

1. A counter-claim must exist in favor of defendant, and against the plaintiff, *at the time* the action was commenced, and an answer alleging that plaintiff *is* indebted, &c., and that the sum claimed *is now* due, &c., is bad on demurrer. *Rice v. O'Connor, Ante, 362.*
2. The only demands which defendant can set up as a counter-claim are demands against the plaintiff. 1859, *Duncan v. Stanton, 30 Barb., 533*; and see *Cumings v. Morris, 3 Bosw., 560.*
3. A. and B. were common carriers—A. between New York and Oswego, and B. between Oswego and Cleveland. By agreement, all through business was divided between them in a fixed proportion. Some goods having been shipped for Cleveland, in charge of A., at New York, B. received them at Oswego, paid A. his share of the freight, and delivered them at Cleveland, under a bill of lading charging them with the entire freight. The owner accepted them under this bill of lading, but refused to pay freight. In an action brought by B. for the freight, against the owner,
Held, 1. That B. was entitled to the whole freight, under the bill of lading.
2. That A. need not be joined as a plaintiff.
3. That a demand against A. for injuries to other goods carried by him, could not be set up as a counter-claim in such action.
4. That it might have been set up as such if A. had been the plaintiff. 1859, *Merrick v. Gordon, 20 N. Y. (6 Smith), 93.*
4. In an action arising on contract, the answer set up that before the commencement of the action the parties submitted the matters in controversy to arbitration under bonds, and that pending the hearing the plaintiff revoked the submission, and sought to recover the damages on the revocation as a counter-claim.
Held, That the counter-claim was a proper one. Both demands were on contract, and existed at the commencement of the suit. [13 How. Pr., 249; 12 Ib., 311; 16 Ib., 244; 2 Kern., 156.] 1859, Curtis v. Barnes, 30 Barb., 225.
5. That the pendency of an action for damages is no bar to the setting up of those damages as a counter-claim in a suit afterwards brought against the plaintiff. [3 Sandf., 743; 15 How. Pr., 236; 6 Duer, 697.] 1858, *Wiltsie v. Northam, 3 Bosw., 162.*
6. That a counter-claim cannot be set up in an action by an assignee, when it shows a cause of action against the assignor only. [4 Duer, 285; 3 Kern., 248; 2 Duer, 639.] *Ib.*
7. Section 71 of the Code, precluding an action on a judgment without

COUNTY COURT.

- leave, &c., does not repeal 2 Revised Statutes, 354, § 32, subdivision 1, allowing a judgment to be set off; and a judgment may be pleaded as a counter-claim without leave of court. *Sp. T.*, 1858, *Wells v. Henshaw*, 3 *Bosw.*, 625.
8. A justice's judgment may be used as a counter-claim in an action, although such action is brought in the same county, within five years after the rendition of the judgment. 1859, *Clark v. Story*, 29 *Barb.*, 295.
9. Wrongful acts on the part of a landlord, not merely a breach of the contract of leasing, but wrongful independent of his obligations under that—*e. g.*, injuries to the tenant's property on the premises, and to the possession, committed not under a claim of right—cannot be set up as a counter-claim by the tenant in an action against him for the rent. *Edgerton v. Page*, *Ante*, 119.
10. Though by not replying, plaintiff might be deemed to admit a counter-claim set up in the answer, the defendant waives this advantage if he goes into proof of the counter-claim, and shows that the facts he relied on do not constitute one—*e. g.*, that the claim is due to him jointly with another person not a party. 1859, *Campbell v. Genet*, 2 *Hilt.*, 290.

DEFENCES, 17.

COUNTY COURT.

1. The County Court is a court of common-law jurisdiction, and has jurisdiction in naturalization proceedings, under the act of Congress. 1860, *People v. Pease*, 30 *Barb.*, 588.
2. Subdivision 13 of section 30, amended to read as follows: "To grant new trials, or affirm, modify, or reverse judgments in actions tried in such court upon exceptions, or case made subject to an appeal to the Supreme Court; but in any action or proceeding pending in the County Court; in which the county judge is, for any cause, incapable of acting, it shall be his duty to make a certificate of such fact, and file the same in the office of the clerk of such County Court; and thereupon jurisdiction of such action or proceeding shall be vested in the Supreme Court, and such further proceedings shall be had therein, according to the practice of such court, as might have been had in the County Court if such cause or matter had remained therein; but all such matters shall be heard or tried in the first instance at a special term or Circuit Court, held in a county where such action or proceeding is instituted." *Laws of 1860*, 783, ch. 459, § 1.

COURT, 2.

COURT.

COURT.

1. A judge holding circuit is not justified in postponing a cause to a hearing before some other judge, merely because it had been previously tried by himself. 1858, *Fry v. Bennett*, 3 *Bosw.*, 200.
2. *It seems*, that justices' and county courts ought to follow the decisions of the general term of the Supreme Court in *their own* districts, without regard to conflicting decisions in other districts, until the question in dispute is settled by the Court of Appeals. 1859, *Jones v. N. Y. and Erie Railroad Co.*, 29 *Barb.*, 633, 636.

COURTS OF SESSIONS.

Records of conviction to be made and filed, and fines to be paid over within thirty days. *Laws of 1860*, 983, ch. 493.

CREDITORS' ACTION.

1. A mere creditor at large cannot maintain an action to avoid an assignment by his debtor, on the ground of fraud. [3 *Kern.*, 188.] *Sp. T.*, 1859, *Cropsey v. M'Kinney*, 30 *Barb.*, 47; and see *Mills v. Block*, 30 *Ib.*, 549.
2. A creditor who has obtained and levied an attachment against the property of his debtor, but has not obtained judgment in the action in which such attachment is issued, cannot maintain a second action to set aside an alleged fraudulent judgment against the same defendant, and enforce his demand by injunction, &c. He must first obtain judgment by proceeding in the attachment suit. 1859, *Mills v. Block*, 30 *Barb.*, 549.
3. A creditor cannot maintain an action in his own behalf alone, to set aside an assignment for the benefit of creditors, made contrary to the statute respecting limited partnerships. He must sue for the benefit of himself and the other creditors. *Greene v. Breck*, *Ante*, 42.
4. A complaint in a creditor's action, though upon two judgments, the execution upon one of which has been returned unsatisfied, and though seeking to set aside two several conveyances of real property to separate grantees—states but one cause of action. *Supreme Ct.*, *Sp. T.*, 1859, *Jacot v. Boyle*, 18 *How. Pr.*, 106.

CRIMINAL LAW.

1. A warrant for arrest of a criminal offender, issued under 2 *Rev. Stat.*, 706, under which the person is arrested and discharged on giving re-

DAMAGES.

- cognizance, cannot authorize a second arrest, though the recognizance is void. The warrant is spent by the first arrest. [Disapproving of *Clark v. Cleveland*, 6 Hill, 349.] 1859, *Doyle v. Russell*, 30 *Barb.*, 300.
2. One who is arrested under section 16 of the act to suppress intemperance (2 *Laws of 1857*, 405), has a right to give bail, and if he does so, cannot be coerced into a summary trial before the magistrate. 1859, *Hill v. People*, 20 *N. Y.* (6 *Smith*), 363; S. C., 18 *How. Pr.*, 289.
 3. A local officer appointed to discharge the duties of a county judge or surrogate, may take a recognizance of bail in a criminal case. Such an act is a "special case," within Art. 6, § 15, of the constitution. 1859, *People v. Main*, 20 *N. Y.* (6 *Smith*), 434.
 4. Such power may be exercised by him, notwithstanding the county judge of the county is not disabled from performing it. *Ib.*
 5. A person accused under the act of 1857 (ch. 628), of being intoxicated in a public place, cannot be summarily tried before a justice, unless he so elects, but is entitled to give bail for his appearance at the sessions. 1859, *Hill v. The People*, 20 *N. Y.* (6 *Smith*), 363.
 6. Indictments for murder, within what time to be found. *Laws of 1860*, 474, ch. 271.
 7. Of the requisite proof to sustain an indictment for obtaining money on false pretences. *People v. Fowler*, 18 *How. Pr.*, 493.
 8. The judge should refuse to charge on the facts. *Supreme Ct.*, 1858, *People v. Davis*, 18 *How. Pr.*, 134.
 9. Punishment of murder and other capital offences. *Laws of 1860*, 712, ch. 410.
 10. An order quashing a conviction and sentence is not a judgment upon an indictment which can be reviewed on a writ of error, under the act of 1852. (*Laws of 1852*, 76, ch. 82.) *People v. Barry*, *Ante*, 225.

COURTS OF SESSIONS; DISTRICT ATTORNEY; INDICTMENT.

DAMAGES.

1. In an action brought on a *quantum meruit*, for services rendered under a special contract, discharged by the act of God or of the law, the plaintiff is entitled to recover the full value of the services rendered, not exceeding the rate fixed by the contract. 1859, *Wolfe v. Howes*, 20 *N. Y.* (6 *Smith*), 197.
2. Only nominal damages are recoverable for the failure of a vendor to perform an executory contract for the conveyance of land, made in good faith, and broken without fraud through his inability to make a good title. [2 *W. Bl.*, 1078; 2 *Wend.*, 399; 4 *Den.*, 546; distin-

DAMAGES.

- guishing Nurse *a.* Barns, 1 *Ld. Raym.*, 77; Hopkins *a.* Greenbrook, 6 *B. & C.*, 31; Trull *a.* Granger, 4 *Seld.*, 115; Brinckerhoff *a.* Phelps, 24 *Barb.*, 100.] 1859, Conger *a.* Weaver, 20 *N. Y.* (6 *Smith*), 140.
3. Of the measure of damages in an action by the grantee for breach of covenant against incumbrances. 1859, Grant *a.* Tallman, 20 *N. Y.* (6 *Smith*), 191.
 4. Measure of damages in an action for breach of a special contract. Lowenstein *a.* Chappell, 30 *Barb.*, 241.
 5. In an action for the recovery of money staked on an illegal wager, the plaintiff, if successful, is entitled to interest from the commencement of the action, and, *it seems*, from the date of demand. 1859, Ruckman *a.* Pitcher, 20 *N. Y.* (6 *Smith*), 9.
 6. The fact that the stakeholder had paid away the money, by order of the plaintiff, before the demand for its return, does not affect the case in any way. *Ib.*
 7. When interest should be allowed on an unliquidated demand. M'Mahon *a.* New York and Erie Railroad Co., 20 *N. Y.* (6 *Smith*), 463.
 8. In an action against a common carrier for negligence in not carrying merchandise to market within a reasonable time, the plaintiff cannot recover as damages the difference between the price of the merchandise at the time when it should have been delivered, and the price at the time of its actual delivery,—no deterioration having occurred to the article itself. [19 *Barb.*, 36; overruling Kent *a.* Hudson River Railroad Co., 22 *Barb.*, 278.] *VIII. Dist.*, 1859, Jones *a.* New York and Erie Railroad Co., 29 *Barb.*, 633.
 9. In an action by a second mortgagee of chattels, to recover for a wrongful conversion thereof, against a prior mortgagee claiming under a usurious mortgage, the defendant will be regarded as the general owner, and the plaintiff as having only a special interest, and he can recover only the amount remaining due on the mortgage. [See 21 *Wend.*, 300; 7 *Cow.*, 670; 3 *Den.*, 33; 8 *Wend.*, 445.] 1859, Chadwick *a.* Lamb, 29 *Barb.*, 518.
 10. The mortgagee of chattels cannot recover beyond the sum due upon his mortgage, in an action against a creditor of the mortgagor, who seizes and sells the mortgaged property by virtue of an execution against the mortgagor while he has the possession, after the mortgage becomes due. [See 3 *Den.*, 33.] Wood *a.* Combs, *MS.*, cited in Chadwick *a.* Lamb, 29 *Barb.*, 522.
 11. The *pecuniary* damages caused by the death of the injured person, are the only damages recoverable under the statutes of 1847 and 1849. The suffering of the deceased, or of the next of kin, cannot be taken into account. 1859, Lehman *a.* City of Brooklyn, 29 *Barb.*, 234.

DECISION.

12. Where a trespass has been committed on real estate,—*e. g.*, where trees have been cut down and removed, evidence to show the value of the premises immediately before and after the trespass, is not improper. The measure of damages is not the mere commercial value of the wood removed. [26 Barb., 409.] 1858, Van Deusen *a.* Young, 29 Barb., 9.
13. That punitive damages may be given for malicious injuries to the person. 1858, Etchberry *a.* Levielle, 2 Hilt., 40.

DECISION.

Section 267 of the Code,—prescribing the mode of a decision on a trial by the court,—amended to read as follows: Upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found and the conclusions of law, separately; and upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly. *Laws of 1860, 785, ch. 459, § 6.*

DEFAULT.

1. It is almost of course to open a default if the proposed defence is not clearly frivolous, is set up in good faith, and the neglect excused. *Sp. T.*, 1860, Commissioners of Excise *a.* Hollister, 2 Hilt., 588.
2. After two attempts to serve an answer, which failed by reason of plaintiff's attorney's office being closed, the clerk of defendant's attorney, to whom the duty of making service was committed, forgot it, and in the absence of the defendant's attorney from town, the time for service elapsed.

Held, that the court would open the default; and an order refusing to do so was reversed on appeal, under a certificate according to rule of 1851. 1858, Clark *a.* Lyon, 2 Hilt., 91.

3. On opening, upon sufficient excuse, a default regularly taken against the defendant, the court should not impose, as terms of the favor, a requirement that the defendant shall not interpose the defence of a former adjudication. *Audubon a. Excelsior Fire Insurance Co.*, *Ante*, 63.
4. The rule that on opening a default, the defendant may be restricted in his defences, should not be extended to defences other than those of usury, limitations, &c., which gave rise to the rule. *Ib.*

DEFENCES.

DEFENCES.

1. In an action to recover possession of real property, an equitable right to possession in defendant as against the plaintiff, is available as a defence, and entitles him to judgment for the premises. 1860, *Thurman v. Anderson*, 30 *Barb.*, 621; and see *McCray v. McCray*, *Ib.*, 633.
2. In an action upon an award, the defendant may set up in his answer facts sufficient to authorize the court to vacate the award, and pray an affirmative judgment to that effect. He is not driven to a cross-action for that purpose. *Gen. T., II. Dist.*, 1859, *Knowlton v. Mickles*, 29 *Barb.*, 465.

It seems, that under mere general denial, the defendant could not show that the award was irregularly made. *Ib.*

3. The receipts given by an express company for goods received by them to be forwarded, fixed the damages which they were to pay in case of delay, and provided that all claims for damages should be presented "at the New York office for settlement."

Held, that it was not necessary for plaintiff suing to recover such damages, to show that he had presented his claim there. Defendants readiness to pay is only a matter of defence. 1858, *Place v. Union Express Co.*, 2 *Hilt.*, 19.

4. A stipulation, in a contract for work to be done upon a railroad, that all questions in dispute relative to such work shall be decided by the engineers of the railroad, is no bar to an action upon the contract. [1 *Seld.*, 422.] *Hart v. Lauman*, 29 *Barb.*, 411.
5. The surety, on taking an assignment of the debt, entered into an agreement with the assignor that he would use care and diligence in collecting the debt from the principal debtor, and when collected would pay the assignor one-half.

Held, That his agreement required the surety to make an effort to collect the debt; it was no defence to him that the debtor might have resisted payment by reason of payment by the sureties. He was equitably bound, and might not have interposed a defence. 1859, *Warfield v. Watkins*, 30 *Barb.*, 395.

6. The defendant in an action on a contract—*e. g.*, a promissory note—who sets up in his answer a breach of warranty in the sale in payment whereon it was given, is not precluded, by such answer, from commencing an action before a justice for a fraudulent representation as to the same matter. [3 *Sandf.*, 743.] But judgment in the latter action is a bar to the cause of action on the warranty. The warranty and fraud, as to the same thing, form but a single cause of action, enforce-

DEFENCES.

- able at the election of the injured party, by action on the warranty or for the fraud. A *recovery* in one of those modes is a bar to another action. The fact that an appeal has been brought from the judgment recovered in the second action does not affect the conclusive nature of the judgment as a bar to the use of the same facts as a defence in the first action, while it remains unreversed. *Supreme Ct.*, 1859, *Harris a. Hammond*, 18 *How. Pr.*, 123.
7. An agreement to extend the time of payment of a debt is a good defence to an action against a surety thereof, notwithstanding it was founded upon a usurious consideration. [Limiting *Vilas a. Jones*, 1 *Comst.*, 274; 10 *Paige*, 76; overruling *Tudor a. Goodloe*, 1 *B. Monroe*, 322; *Kenningham a. Bedford*, *Ib.*, 325; see *Boughton a. Smith*, 26 *Barb.*, 635.] 1859, *Draper a. Trescott*, 29 *Barb.*, 401.
 8. The defence that there has been a former adjudication on the matter in controversy is neither dishonest nor unconscionable. *Audubon a. Excelsior Fire Insurance Co.*, *Ante*, 63.
 9. In an action against a common carrier for non-delivery of goods, the fact that the damage was caused solely by the wilful refusal of the carrier's servants to do their duty, is no defence. [17 *N. Y.*, 362.] 1859, *Blackstock a. N. Y. & Erie Railroad Co.*, 20 *N. Y.* (6 *Smith*), 48.
 10. In an action to recover money paid on an illegal wager [1 *R. S.*, 662], the fact that the money was paid contrary to the statute [Laws of 1830, ch. 295], in foreign bank-notes of a less denomination than \$5, constitutes no defence. 1859, *Ruckman a. Pitcher*, 20 *N. Y.* (6 *Smith*), 9.
 11. A purchaser of goods from an assignee for the benefit of creditors, cannot resist an action for the price, on the ground that the sale was made on credit, in violation of the trust. 1859, *Small a. Ludlow*, 20 *N. Y.* (6 *Smith*), 155.
 12. Where an assignee for the benefit of creditors sold a claim to a third party, under an agreement that the latter should appropriate the proceeds to the payment of the creditors in the assignment,—*Held*, in an action to enforce the claim, that the defendant could not resist it on the ground that the trustee had improperly assigned his trust. Such an objection can only be raised by the *cestuis que trust*. *Ib.*
 13. A supervisor who receives money from a county treasurer under 1 Laws of 1857, 546, § 4—making it his duty to pay it to holders of public bonds—cannot resist an action by the bondholders on the ground that the bonds are void. 1859, *Ross a. Curtis*, 30 *Barb.*, 238.
 14. A county treasurer may be sued at the same time by the People for the amount of the state tax received by him, and by the supervisors of his county for the entire amount of his official liabilities, including

DEFENCES.

the same tax, and nothing short of payment in one of the suits will be a bar to judgment in the other. A judgment in either action, and imprisonment under execution thereon, will not bar a judgment in the other. [1 R. S., 5th ed., 863, 865, 926, 928.] 1859, *Supervisors of Livingston v. White*, 30 *Barb.*, 72.

15. In an action against a railroad company for the value of a colt killed by a train on the road, it was proved that the colt entered the road through a gap in the fence made by a trespasser, but left unrepaired by the company for one or two weeks; that the colt then walked along the track, until that crossed the highway, when it jumped the cattle-guard, and ran along the track.

Held, 1. That the fact of the gap having been made by a trespasser, was no defence to the action. The company ought to have repaired it.

2. That the other facts constituted no defence.

3. That the negligence of the plaintiff, in suffering his colt to run at large, was no defence, the defendants having neglected their duty under the statute. [Laws of 1850, p. 233, § 44; see 3 *Kern.*, 42.] 1859, *Meurch v. New York Central Railroad Co.*, 29 *Barb.*, 647.

16. In an action by the vendor upon an executory contract for the sale of stock in a corporation, it is a good defence for the purchaser to show that, at the time of making the contract, the corporation had been annulled, without his knowledge. [16 *N. Y.*, 595.] 1859, *Kip v. Monroe*, 29 *Barb.*, 579.

17. In an action upon a bond conditioned for the payment of money, brought by an assignee thereof, the obligor answered that the bond was executed by him to the plaintiff's assignor in consideration of the performance by the latter of certain covenants, which he had not performed, to the damage of the defendant in an amount greatly exceeding the penalty of the bond.

Held, 1. That these facts constituted a good defence against the assignee's claim, as he took the bond subject to all the equities of the obligor. [2 *Duer*, 639; questioning *Spencer v. Babcock*, 22 *Barb.*, 326.]

2. That they did not constitute a counter-claim against him. [2 *Duer*, 639; 22 *Barb.*, 326; 27 *Barb.*, 79.] 1859, *Western Bank v. Sherwood*, 29 *Barb.*, 383.

18. A tenant who has continued to occupy the whole of the demised premises during the whole period for which rent is claimed, is not released from payment of such rent by reason of the fact that the landlord has committed acts which diminished the beneficial enjoyment of the premises during the period for which the rent is sought to be re-

DEMAND BEFORE SUIT.

covered. While the tenant remains in possession of the entire premises, his obligation to pay rent continues; though it is otherwise if he is compelled to abandon possession before the rent falls due. *Edgerton v. Page, Ante*, 119.

19. A judgment of forfeiture for non-payment of rent is no bar to an action for the rent accrued up to the time of forfeiture. 1859, *Mattice v. Lord*, 30 *Barb.*, 382.

INFANT, 5.

DEMAND BEFORE SUIT.

1. A receiver, appointed in supplementary proceedings commenced against a husband, brought an action to recover certain personal property, which his wife claimed as her separate estate. On making demand upon the wife before suit, she did not inquire as to the receiver's authority, but refused to deliver it, on the ground that her husband did not own any of it.

Held, 1. That the demand and refusal were sufficient, as against the wife, for the objection that the receiver did not disclose his authority could not be raised for the first time at the trial.

2. That they were insufficient as against the husband, for the wife is not the agent of the husband to respond to such demands. 1858, *Livingston v. Stoessel*, 3 *Bosw.*, 19.
2. Where part-payment has been made upon a contract which the payee afterwards rescinds, an action may be brought for the money, without any previous demand for its return. [12 *Johns.*, 274; see 5 *Hill*, 107; 14 *N. Y.*, 492.] 1859, *Fancher v. Goodman*, 29 *Barb.*, 315.
3. In an action for chattels, a demand before suit is only necessary where the chattels were lawfully in defendant's possession. *N. Y. Car Oil Co. v. Richmond, Ante*, 185.

DEMURRER.

1. A complaint which demands more relief than can be awarded, is not demurrable on that ground. *Sp. T.*, 1858, *Moses v. Walker*, 2 *Hill.*, 536.
2. Plaintiff cannot demur to a defence consisting of denials merely. He can demur only when the *new matter* in the answer, upon its face, does not constitute a counter-claim or defence. *Rice v. O'Connor, Ante*, 362.
3. Effect of amendment of 1857, respecting cases in which an answer may be demurred to, considered. *Wightman v. Shankland*, 18 *How. Pr.*, 79.

DEPOSITION ON COMMISSION.

4. When the allegations of an answer are contradictory, a demurrer only admits those allegations which the law adjudges to be true. A demurrer to an answer that defendant is civilly dead, does not admit the death; for civil death is a fiction which is contradicted by the very fact that defendant has answered. *Freeman v. Frank, Ante, 370.*
5. Where a demurrer is interposed which the pleader could not have supposed would dispose of the case on the merits, it cannot be deemed to have been put in in good faith. *Osgood v. Whittlesey, Ante, 134.*
6. After putting in such a demurrer, and after failing to avail himself of leave obtained to withdraw it and answer, a motion for an order granting him such leave should not be made, unless the defendant shows a meritorious defence. *Ib.*

DEPOSITION ON COMMISSION.

1. Where the paper on which a deposition is written is so nearly filled up as not to leave room for the return of the commissioner to be indorsed on the same piece, it may be indorsed on a separate piece of paper attached to the same. [*Limiting Fleming v. Hollenback, 7 Barb., 273; Hall v. Burton, 25 Barb., 274; McCary v. Edwards, 27 Barb., 240.*] 1859, *Pendell v. Coon, 20 N. Y. (6 Smith), 134.*
2. Whether the return need in any case be written on the same piece of paper with the deposition,—*Query?* *Ib.*
3. A commission to take testimony is a writ or process issued by special order of the court, and a seal is essential to its validity. [*19 Johns., 212; 6 Ham. (Ohio), 11; 5 Ired., 96; 4 Dev., 95; 3 Ib., 297.*] 1859, *Tracy v. Suydam, 30 Barb., 110.*

DETERMINATION OF CONFLICTING CLAIMS TO REAL PROPERTY.

The provisions of tit. 2 of ch. 5 of part 3 of the Revised Statutes—as amended 1848, ch. 50, and 1855, ch. 511—apply as well to any claim to an estate for any term of years not less than ten, in possession, reversion, or remainder, as to a claim to an estate in fee or for life therein; and in all proceedings to be commenced pursuant to said title as amended, the judgment to be rendered is to determine all claim to any estate for a term of years not less than ten. *Laws of 1860, 295, ch. 173.* (Took effect April 6, 1860.)

DEVISE.

A devise of lands to a corporation for charitable uses, which that corporation has not power to take, is void, and the testator's intent can-

DISCHARGE.

not be carried into effect under the statute 43 Eliz. [14 N. Y., 380.]
Sp. T., 1859, *Boyce v. City of St. Louis*, 29 *Barb.*, 650.

DISCHARGE.

INSOLVENT.

DISCONTINUANCE.

1. A notice countermanding a summons is a discontinuance, and, after appearance by attorney, is inoperative without payment of costs. *Sp. T.*, 1860, *Pignolet v. Daveau*, 2 *Hill.*, 584.
2. Pending a foreclosure action, the land was discharged from the lien of the mortgage by arrangement between the parties, on payment of the fund into the receiver's hands.
Held, that the action was not discontinued, and might be revived, on the death of the complainant and receiver, by his successor. *Supreme Ct.*, *Sp. T.*, 1860, *Palmer v. Murray*, 18 *How. Pr.*, 546.
3. Practice in revivor of writs in equity. *Ib.*
4. On discontinuance by plaintiff, defendant cannot enter judgment for costs; but must proceed to have the action dismissed, if the costs on the discontinuance are not paid. *Hicks v. Brennan*, *Ante*, 304.

DISCOVERY AND INSPECTION.

1. On an application for discovery, enough must be shown to satisfy the court that there is reason to believe that the documents sought do in fact contain material evidence. Merely showing a belief that the papers in general of the plaintiff contain matter which would help the defence, is not sufficient. It must also appear that the party does not possess other means of proof. *Pegram v. Carson*, *Ante*, 340.
2. A petition for a discovery should be denied where it appears that the petitioner might have access to the books and papers without an order—*e. g.*, where it appears that he is one of the directors of a corporation to which the books and papers belong, and that the custodian of them holds them subject to the control of the board thereof. *Charlick v. Flushing Railroad Co.*, *Ante*, 130.
3. An affidavit to resist a motion that books and papers be deposited for inspection, on the ground that the affiant has not possession of them, is not sufficient if it is evasive in not showing how he parted with possession. *Hicks v. Charlick*, *Ante*, 129.

DISTRICT-ATTORNEY.

District-Attorneys directed to file minutes of trial of convicts within thirty days after end of term. *Laws of 1860*, 216, ch. 135.

DISTRICT COURTS OF THE CITY OF NEW YORK.

1. Under the act of 1857, a verification by the defendant in this form—
“the defendant, being duly sworn, says that he believes the foregoing answer to be true”—is sufficient. 1859, *Schwerin v. Mills*, 2 *Hilt.*, 394.
2. On the return of the summons the parties appealed and pleaded, and by consent adjourned to meet on another day at the private office of the justice, which was without his district. On that day, the justice being absent, the parties went before another justice, who heard the cause and gave judgment.
Held, that the proceedings were void. Where the trial is before a justice of another district than the one where the summons was issued, it must be because the first justice was absent from the usual place of holding court, or ill. The non-attendance of the justice was a discontinuance; and the trial before the second justice was not a voluntary appearance which would give him jurisdiction, because the pleadings were put in before the first-mentioned justice, and it was not shown that he was absent from his usual place of holding court. 1859, *Reed v. Warth*, 2 *Hilt.*, 281.
3. The plaintiff may, at any time before the action is finally submitted, discontinue; and this notwithstanding that defendant has set up a counter-claim. 1858, *Bidwell v. Weeks*, 2 *Hilt.*, 106.
4. The provision of section 50 of the act to reduce the several acts relating to the district courts in the city of New York into one act (1 *Laws of 1857*, 720)—directing that “when a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it must be so stated in the judgment and entered in the docket,”—assigns to the justice trying a cause under it, as part of his judicial duty, the obligation and necessity of passing upon the question of the defendant’s liability to an arrest, as definitely as upon that of his liability in the action, and to embody his judicial conclusion in his judgment. *N. Y. Superior Court*, 1860, *Carpentier v. Willett*, 18 *How. Pr.*, 400.
5. Where on the day following the giving of judgment the plaintiff produced an affidavit of the nature of the indebtedness, and the justice thereupon made an order allowing execution against the person to issue;—*Held*, 1. That the order was void.
2. That its invalidity was a defence to the sheriff in an action against him for the defendant’s escape. [13 *Wend.*, 68; 2 *Q. B.*, 771.] *Id.*

DIVORCE.

DIVORCE.

After a decree of limited divorce has been obtained in the courts of another State, and while it remains unimpeached, the plaintiff cannot maintain an action here for an absolute divorce on the ground of adultery. *So held*, on a motion for an allowance of alimony. *Coddington v. Coddington*, *Ante*, 450.

. DOWER.

1. When it clearly appears by the will, that the testator has distributed the residue of his property, after making provision for his widow, among his children, or other persons, in such proportion as he considered them entitled to; and that to allow the widow to take both the provision of the will and her dower out of the estate, would defeat, or materially lessen the allotments to all or any of the devisees or legatees,—the intention of the testator not to give her both the provision and dower out of his estate, is to be deemed plainly manifested, and the court should require the widow to elect. *Dodge v. Dodge*, *Ante*, 401.
2. If a trust declared by the will, is plainly inconsistent with any intention to allow the widow both her dower and other provision, she must be put to an election, even though the trust be void. *Ib.*
3. The provision of 1 Revised Statutes, 741, § 5—that the wife is not entitled to dower in lands mortgaged when purchased, for the purchase-money, as against the mortgagee, and those claiming under him—does not affect her right to dower in the equity of redemption. *Mills v. Van Voorhis*, *Ante*, 152.

EJECTMENT.

In an action of ejectment for non-payment of rent (under 2 *Rev. Stat.*, 5th ed., 829, §§ 1, 2), the defendant, after trial of the issue of law raised by his demurrer to the complaint, and final judgment thereon against him in the Court of Appeals, moved in the Supreme Court for a new trial, under the provisions of 2 *Rev. Stat.*, 596, § 30, allowing a new trial as a matter of right in an action of ejectment.

Held, that the application should be denied. 1. It is only *after verdict* that a new trial is allowed by the statute. 2. The hearing on a demurrer is not a *trial* within that statute. 3. The statute does not apply to ejectments for arrears of rent. It contemplates those in which damages as well as costs may be recovered. *Supreme Ct., Sp. T.*, 1859, *Christie v. Bloomingdale*, 18 *How. Pr.*, 12.

ELECTION OF REMEDIES.

ELECTION OF REMEDIES.

ACTION, 5; JOINDER OF ACTIONS, 2.

ELECTIONS.

The extent to which the decisions of inspectors of elections are inquirable into, in an action in the nature of a *quo warranto*. *People v. Pease*, 30 *Barb.*, 588.

RELIGIOUS CORPORATION.

ESCAPE.

The arrest by the sergeant-at-arms, under a warrant from the House of Representatives, of a prisoner in custody of a sheriff, and the removal of him out of prison by virtue of such arrest, is a removal "by virtue of some writ of habeas corpus or rule of court, or in such other cases as may be prescribed by law," within 2 Revised Statutes, 437, as modified by chapter 390, section 2, of the Laws of 1847—providing that being out of prison in such cases is not an escape. *Wickelhausen v. Willett*, *Ante*, 164.

ESTOPPEL.

1. A mere employee in charge of property cannot estop the owners by consenting to a levy thereon. *Car Oil Co. v. Richmond*, *Ante*, 185.
2. The allegations of a party in a verified pleading will estop him from asserting the contrary in another action between the same parties. 1859, *Sheppard v. Hamilton*, 29 *Barb.*, 156.

EVIDENCE.

I.—*Burden of Proof*.

1. The burden of proof is on the party who asserts the fact. 1859, *Green v. Waggoner*, 2 *Hilt.*, 297.
2. In an action for injuries caused by the defendant's negligence, the plaintiff is bound to show, affirmatively, that the injury resulted wholly from the defendant's negligence, and that the plaintiff's own negligence and improvidence did not bring it about. 1859, *Gen. T., II. Dist., Schuman v. City of Brooklyn*, 29 *Barb.*, 234; and see *Johnson v. Hudson River Railroad*, 20 *N. Y. (6 Smith)*, 65.
3. Of the nature of such evidence in the case of injuries to a child. *Id.*

EVIDENCE.

4. Where a carrier defends himself from a claim for injuries, on the ground that the plaintiff knew of the defects in the vehicle which caused the injuries, it is incumbent upon the former to prove such knowledge, or at least that such defects were brought under the plaintiff's notice. 1859, *Harris v. Northern Indiana Railroad Co.*, 20 *N. Y.* (6 *Smith*), 232, 236.
5. In an action against a carrier for damage caused by delay, it lies with the defendant to excuse the delay. It is not necessary for the plaintiff to prove affirmatively that it was unreasonable. *Ib.*, 239.

II.—Presumptions.

1. Where a contract for the sale of goods omits to fix any time for payment, the presumption is that the delivery and payment are to be concurrent acts. 1859, *Tipton v. Feitner*, 20 *N. Y.* (6 *Smith*), 423.
2. Where the plaintiff accepted, as security for a loan of \$500, a note of \$275, signed by A. as maker, and by B. as "surety," and a note for \$225, signed by A. alone, and paid the money to A., B. not being present,—*Held*, that the legal presumption was, that the loan was made to A. alone. *Sp. T.*, 1859, *Underhill v. Crawford*, 29 *Barb.*, 664.
3. Such presumption may be rebutted by legal evidence; but the testimony of A., in general words, "that the \$500 was a loan to us jointly," is not sufficient for the purpose. It is a mere legal conclusion. *Ib.*
4. Upon such evidence, the question could not be submitted to the jury. *Ib.*
5. In the absence of all proof, there is no presumption that either party to a contract for the sale of land intends, in giving or accepting a conveyance, to give up the benefit of covenants of which the conveyance is not a performance or satisfaction. 1859, *Morris v. Whitcher*, 20 *N. Y.* (6 *Smith*), 41.
6. *It seems*, that in the absence of proof on the subject, it will be presumed that the laws of another State relating to interest and usury, are the same as our own. [2 *Hill*, 201.] 1859, *City Savings Bank v. Bidwell*, 29 *Barb.*, 325.
7. But there is a stronger presumption against the commission of crime, or the existence of any state of facts involving a forfeiture; and such presumption extends not only to proceedings for the punishment of the supposed offence, but also to civil cases in which it is collaterally brought in question. [Best on Presumptions, 64, 65.] *Ib.*
8. In an action upon a note made in Connecticut, payable in New York,

EVIDENCE.

it was proved that the transaction was usurious according to New York statute law, but no proof was given of the law of Connecticut on the subject.

Held, that the court would not presume that the contract was illegal. *Ib.*

9. Where a mortgage was assigned to T., "as treasurer of M. University," a corporation, "and to his successors in office;" and he took and held it, and foreclosed it in his official character, stating in the notice of sale that he, "as such treasurer," was "the owner and holder" of the mortgage,—*Held*, that the court would presume, in the absence of proof on the subject, that T., as treasurer, had authority to foreclose the mortgage by advertisement, and sell the premises, to receive all moneys due upon it, and to cancel or satisfy it. [5 Wend., 575.] 1859, Howard *a. Hatch*, 29 *Barb.*, 297.

III.—*Public Records.*

1. Nothing will be presumed against the jurisdiction of an inferior court. [4 Comst., 386; 12 Barb., 547.] 1859, Reno *a. Pinder*, 20 *N. Y.* (6 *Smith*), 298.
2. The jurisdiction of a justice may be proved in a collateral proceeding in any of the following ways: 1. By the constable's return; 2. By an entry on the justice's docket, made at the time; 3. By direct evidence of the service; 4. By the testimony of the justice, showing positively that the service was proved before him. [4 Comst., 386; 19 Wend., 477, 479.] *Ib.*
3. Though the proceedings in a justice's court are not strictly a record, they must be produced, and parol testimony of them is incompetent. [11 Johns., 166.] *N. Y. Com. Pl.*, 1859, Grimm *a. Hamel*, 2 *Hilt.*, 434.
4. That producing the summons with entry of judgment indorsed, is the proper evidence of a justice's judgment. *Carpentier a. Willett*, 18 *How. Pr.*, 400.
5. That an order of another court cannot be proved by a copy of the record, even though signed by the judge and attested by his seal, unless it is proved or certified to be an examined copy. *Mahony a. Gunter*, *Ante*, 431.
6. *It seems*, that a judgment-roll may be introduced in evidence without further proof of the service of summons than is contained in the roll itself. 1859, City Bank of Brooklyn *a. Dearborn*, 20 *N. Y.* (6 *Smith*), 244.
7. If any thing more could be required, the testimony of the person who served the summons is certainly sufficient. *Ib.*

EVIDENCE.

8. *It seems*, that a judgment taken by default against two persons jointly, is some evidence to show that they considered themselves jointly liable for obligations of the same character as the one upon which such judgment was founded. *Ib.*
9. A witness who wrote out a notice to be advertised, and gave it to another person to be inserted, cannot be examined, in the absence of all other proof on the subject, as to the contents of the notice. *Ib.*
10. Proof of the incorporation of a manufacturing company may be made by producing a sworn copy of the articles of the association, and evidence that the originals were filed in the office of the county clerk, and that they have been lost, and by production of a certified copy of the duplicate filed in the office of the Secretary of State. *New York Car Oil Co. v. Richmond, Ante, 185.*

IV.—*Private Writings.*

1. On determining the question of the genuineness of a signature by defendant, inspection of signatures by defendant of other papers not relevant to the issue, is not allowable. *Hoyt v. Stuart, 3 Bosw., 447.*
2. The admission of parties as witnesses on their own behalf, has not abrogated the rule of this State as to the admissibility of books of account in evidence. [Overruling *Conklin v. Stamler, 8 Ante, 395.*] *Gen. T., IV. Dist., 1859, Tomlinson v. Borst, 30 Barb., 42.*
3. Before books of account can be admitted as evidence, the party offering them must prove: 1. That at the time the charges were made, he had no clerk; 2. That some of the articles charged were delivered (or some of the work performed); 3. That the books are his account books; 4. That he keeps correct accounts. [12 Johns., 461; 11 Wend., 568.] *Ib.*
4. When books of account are given in evidence, the opposite party cannot give evidence of the *general* bad character of his opponent, but only of his bad character in respect to his dealings, manner of keeping accounts, commercial honesty, &c. [7 Barb., 111.] *Ib.*
5. Of the admission of account books in evidence. *Sackett v. Spencer, 29 Barb., 180.*
6. Of the testimony of experts in regard to handwriting. *Ib.*

V.—*Declarations and Admissions.*

1. The jury may properly be instructed that they may believe a part and reject others of confessions and admissions made by a party, and proved on the trial; and they may believe the fact that he admitted and disbelieve the reasons assigned for it. 1860, *Barnes v. Allen, 30 Barb., 663.*

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2. A party cannot make title to land by a parol admission of his adversary. [3 Seld., 183; 16 N. Y., 354.] 1859, Walker *a.* Dunspaugh, 20 N. Y. (6 Smith), 170.
3. One trustee of a school district cannot, by his admission, establish the relation of landlord and tenant between the district and a party claiming title to the school-house, without the concurrence of his co-trustees. [2 Rev. Stat., 555, § 27.] *Ib.*
4. The prisoner's declarations or admissions not unduly obtained are admissible, though made after the offence. *Supreme Ct.*, 1860, People *a.* Fowler, 18 How. Pr., 493.
5. The confirmation of an assessment roll by the Common Council of New York city is not available, in an action by the contractor, as an admission of the validity of the contract on which the assessment is based. Such action is between other parties, and does not affect the contractor in any way. 1859, Brady *a.* The Mayor, &c., of New York, 20 N. Y. (6 Smith), 312.
6. Declaration of agent to principal as to act done as agent admissible, as showing whether the principal authorized or assented to the act. Meserole *a.* Archer, 3 Bosw., 376.
7. Declarations of the principal in a power of attorney made after suit brought, not admissible to prove the execution of the power as against defendant. Garrigue *a.* Loescher, 3 Bosw., 578.
8. In an action brought by A. to recover money from B., which C. had lent to him on a promise to pay it to A., on account of a debt owed to him by C., proof of the statement of C., at the time of the loan, is sufficient evidence of the indebtedness of C. to A. 1859, Lawrence *a.* Fox, 20 N. Y. (6 Smith), 268.
9. The holder of a note in good faith, and for a valuable consideration, cannot be prejudiced by the statements or omissions of any party to the note, made after the former became such holder. 1859, City Bank of Brooklyn *a.* McChesney, 20 N. Y. (6 Smith), 240.

VI.—*Parol Evidence, to explain or vary.*

1. Whenever the time of the execution of a writing, even of the most solemn kind, becomes material, it may be proved by parol, even in opposition to the date fixed by the writing itself. 1859, Draper *a.* Snow, 20 N. Y. (6 Smith), 331.
2. Parol evidence is inadmissible to show that an absolute conveyance of land, made without fraud or mistake, was made in trust, for the benefit of the grantor. 1859, Sturtevant *a.* Sturtevant, 20 N. Y. (6 Smith), 39.

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VII.—*Best and Secondary Evidence.*

1. Where defendant justifies the taking of property under an execution, the judgment and execution must be produced. [16 Wend., 514, 562; 11 Johns., 166.] Parol proof is not sufficient. 1859, Underhill *a.* Reinor, 2 *Hilt.*, 319.
2. What is sufficient evidence of the loss of a bond to authorize secondary evidence of its contents. Supervisors of Livingston *a.* White, 30 *Barb.*, 72.
3. What is sufficient evidence of the execution of a bond, the same having been lost. *Ib.*
4. That proof that the adverse party never had a certain paper does not dispense with the necessity of giving him notice to produce it, as foundation for the admission of evidence of its contents. Grimm *a.* Hamel, 2 *Hilt.*, 434.

VIII.—*In Particular Actions.*

1. The dishonor of a check drawn by a merchant upon his banker, is *prima-facie* evidence of insolvency. 1859, Brown *a.* Montgomery, 20 *N. Y.* (6 *Smith*), 287.
2. What is proof of legal insanity. People *a.* Sanchez, 18 *How. Pr.*, 72.
3. Of the burden of proof of mental capacity to execute a will. Van Pelt *a.* Van Pelt, 30 *Barb.*, 134.
4. Proof of malice, &c., and proof of circulation, in an action for libel. Fry *a.* Bennett, 3 *Bosw.*, 200, 233.
5. What is sufficient evidence that an officer has taken his oath of office. Halbeck *a.* Mayor, &c., of New York, *Ante*, 439.
6. What is sufficient evidence of tender and refusal. Hoyt *a.* Hall, 3 *Bosw.*, 42; Meserole *a.* Archer, *Ib.*, 376.
7. Distinction between requisite evidence in an action for contract price of manufacture to order, and contract price of sale. Hills *a.* Stillman, 18 *How. Pr.*, 58.
8. What evidence of the liability of a defendant as an original debtor or only as surety, is sufficient to submit the question to the jury. Underhill *a.* Crawford, 18 *How. Pr.*, 112.
9. The requisite evidence and the burden of proof in an action for the hire of premises for a period during which the tenant was not in possession. 1859, Greene *a.* Waggoner, 2 *Hilt.*, 297.
10. What facts are evidence of title of goods in an action for wrongfully taking them. Graham *a.* Harrower, 18 *How. Pr.*, 144.
11. In an action for the conversion of personal property, the goods having been sold at auction, the defendants offered to prove the amount which

EXAMINATION OF ASSIGNOR.

they realized. The evidence was excluded, as not being proper to show the value.

Held, error. The evidence should have been allowed to go to the jury, in connection with any that might be offered on the other side. 1859, *Campbell v. Woodworth*, 20 *N. Y.* (6 *Smith*), 499.

12. *It seems*, that in an action in which exemplary or punitive damages may be recovered—*e. g.*, assault and battery—the defendant may introduce evidence showing the disposition of the plaintiff to create the difficulty, although it was not known to the defendant at the time of the injury complained of. 1859, *Vedder v. Fellows*, 20 *N. Y.* (6 *Smith*), 126.
13. What evidence is admissible in justification, in an action for enticing away plaintiff's wife. *Barnes v. Allen*, 30 *Barb.*, 663.
14. Of evidence and the presumptions in an action by the people to recover possession of land. *People v. Trinity Church*, 30 *Barb.*, 537.
15. What evidence is sufficient, in an action brought by a married woman, to show that the subject of the action is her separate estate. *Wasserman v. Willett*, *Ante*, 63.

EXAMINATION OF ASSIGNOR.

One who transfers a promissory note, is not an assignor within section 399 of the Code. 1858, *Gardner v. Gordon*, 3 *Bosw.*, 369 ; see also *Crosby v. Nichols*, *Ib.*, 450.

EXAMINATION OF PARTY.

1. The members of a dissolved partnership were sued upon a note signed in the firm's name, made after the dissolution, by one of the partners, and passed to a party having no notice of the dissolution. The defendant who made the note offered himself as a witness on behalf of the retiring partner, to prove that he made the note in his own name, without the words "and Co."

Held, That prior to the amendment of 1857, he could not be allowed to testify under the Code. Such evidence was as much for his own benefit as for that of his co-defendant, since a fraudulent alteration of the note would be a good defence for all the defendants. [3 *Kern.*, 266.] 1859, *City Bank of Brooklyn v. M'Chesney*, 20 *N. Y.* (6 *Smith*), 240.

2. In a trial which took place before 1857, after the assignor of the cause of action had testified on behalf of the plaintiff, the defendant offered himself as a witness, "generally in his own behalf" (according to the statement in the case), and was excluded without being sworn.

EXAMINATION OF PARTY.

- Held*, under the Code of 1855, that the defendant should have been sworn, and afterwards his examination should have been restricted to the matters of which the plaintiff's assignor had testified. Unless he distinctly stated that if he could not testify on other points he did not wish to be sworn, the court had no right to exclude him from being sworn. 1859, *Brown v. Richardson*, 20 *N. Y.* (6 *Smith*), 472.
3. Under the Code as amended in 1857, husband and wife are competent witnesses in their own behalf, when co-plaintiffs or co-defendants, and in like cases also competent witnesses for each other. 1859, *Marsh v. Potter*, 30 *Barb.*, 506.
 4. *It seems*, that in actions between one of them and a third person, the one is not competent for or against the other, and that the law is untouched by the Code as to confidential communications between them. *Ib.*
 5. Under section 397 of the Code, a mortgagor made a defendant in foreclosure, together with his grantee, is not a competent witness on behalf of his grantee. *Supreme Ct.*, 1859, *Warden v. Buell*, 18 *How. Pr.*, 256.
 6. Under section 399 of the Code, as amended in 1857, a party might be examined in his own behalf, when the adverse party was a corporation. 1859, *Field v. New York Central Railroad Co.*, 29 *Barb.*, 176.
 7. A party may be a witness, though the adverse party is a corporation; —*So held*, although those who were officers of the corporation at the time of the transactions as to which the testimony was given, had ceased to be such. 1858, *Lafarge v. Exchange Fire Insurance Co.*, 3 *Bosw.*, 157.
 8. Ten days' notice before the examination is sufficient, under section 399, though it is given after the commencement of the trial. 1858, *Bissell v. Hamlin*, 3 *Bosw.*, 383.
 9. If of three defendants two have died, and the third survives, the third is the adverse party, within section 399, he being the one for whose benefit the action is defended, and the plaintiff may be admitted as a witness in his own behalf. *Ib.*
 10. Where a party offers himself as a witness in his own behalf, under section 399 of the Code, his credibility is not to be deemed certified by the plaintiff, but is to be weighed as that of other witnesses. The fact that his testimony contradicts that of the plaintiff's assignor, does not of itself leave plaintiff's case unproved, in analogy to the rule in chancery. 1857, *Forward v. Harris*, 30 *Barb.*, 338.
 11. Section 399 of the Code, amended to read as follows: A party to an action, or special proceeding, including proceedings in Surrogates' Courts, and proceedings for the summary recovery of the possession

EXCEPTION.

of land, may be examined as a witness on his own behalf, or in behalf of any other party, in the same manner, and subject to the same rules of examination, as any other witness, except that a party shall not be examined against parties who are representatives of a deceased person, in respect to any transactions had personally between the deceased person and the witness; and except, also, that neither husband nor wife shall be required to disclose any communication made by one to the other. *Laws of 1860, 787, ch. 459, § 12.*

EXCEPTION.

1. To the charge of the court on the trial, assuming to decide a question of fact, the defendant excepted, on the single ground that the evidence did not warrant the conclusion.

Held, on appeal, that the objection which might have been taken to the decision of a question of fact by the court, was waived. [8 M. & W., 421; 2 Kern., 18.] 1858, Cary *a.* Cleveland & Toledo Railroad Co., 29 *Barb.*, 35, 41.

2. An exception in these words, "To that part of said decision which allows \$3,342 as interest," is a general exception to the allowance of interest at all; and no objection can be taken under it to the *time* for which interest is allowed. 1859, M'Mahon *a.* New-York and Erie Railroad Co., 20 *N. Y.* (6 *Smith*), 463.
3. When any allowance is appealed from as excessive, the excess, if it, be of a definite amount, should be pointed out by the exceptions, so that the respondent may remit it, if he so elect. *Ib.*
4. Where an interrogatory contains several questions, an objection that it is answered only in part, is too general. The questions which are not answered, must be pointed out. 1859, Valton *a.* The National Fund Life Assurance Co., 20 *N. Y.* (6 *Smith*), 32.
5. Where no ground for an exception is stated, it is always disregarded. *Ib.*
6. If there is but a single exception to a refusal to charge as requested, it can only be sustained by showing that every proposition requested, is tenable. [1 Seld., 422; 2 Id., 233.] 1859, Magee *a.* Badger, 30 *Barb.*, 246.
7. No exception lies to a refusal to permit a demurrer to evidence. 1859, Colegrove *a.* The New Haven and The Harlem Railroad Cos., 20 *N. Y.* (6 *Smith*), 492.
8. On the trial, defendant's counsel excepted to the refusal of the court to restrain the remarks of plaintiff's counsel before the jury to the matters at issue and in evidence; but it did not appear that plaintiff's

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counsel subsequently made any remarks which he should not have been permitted to make; and in the charge the court instructed the jury to lay out of view that which had previously been said.

Held, that the exception would not avail as ground of new trial. Defendant should show that improper remarks were made after his exception. 1858, *Fry v. Bennett*, 3 *Bosw.*, 200, 242.

EXECUTION.

1. One sewing machine with the appurtenances, is exempt from sale on execution, when owned by any householder. *Laws* of 1860, 245, ch. 152.
2. A wagon, used by a physician in his business, he being a householder with a family for which he provides, is exempt from execution, under *Laws* of 1842, ch. 157. [1 *Den.*, 128; 1 *Comst.*, 129; 8 *How. Pr.*, 18; *Ib.*, 75; 5 *Ib.*, 288; 1 *Duer*, 606.] 1859, *Van Buren v. Loper*, 29 *Barb.*, 388.
3. Any article exempted by the act of 1842, is liable for the purchase money of any other article also exempt thereby. *Ib.*
4. Real estate in another State cannot be sold on execution; and all proceedings under such sale, or intended to give effect to it, are void, or if regular on their face, will be set aside. 1859, *Runk v. St. John*, 29 *Barb.*, 585.
5. Sheriff may deliver certified copies of executions when satisfied, and clerk is to enter satisfaction of judgment upon docket. *Laws* of 1860, 13, ch. 6.
6. A stipulation on the part of the debtor, stating the cause of action to be money received, and allowing judgment to be entered,—*Held*, not conclusive on a motion for execution against the person on the ground that the cause of action was one for which an arrest was allowed. *Hall v. McMahon*, *Ante*, 103.
7. After a judgment, recovered in the Marine Court, has been docketed in the county clerk's office, the creditor may have execution against the person of the debtor, as if the judgment had been recovered in the Court of Common Pleas. *Ib.*,
8. In an action of ejectment, or for trespass on real property, the defendant may be arrested and held to bail. [Code, §§ 179, 464.] Therefore if the plaintiff in such an action is defeated, an execution may issue against his person for the costs. [Code, § 288.] 1859, *Merritt v. Carpenter*, 30 *Barb.*, 61.
9. Where the right to arrest depends upon some fact wholly extrinsic to the cause of action itself, the question of such liability must be deter-

EXECUTORS AND ADMINISTRATORS.

mined by obtaining an order to arrest, or by proceedings to be had upon such an order, obtained before judgment. An execution against the person cannot be issued after judgment in an action of this nature in which no such order to arrest has been made. *N. Y. Superior Ct., Sp. T.*, 1860, *Kendenburgh a. Buys*, 18 *How. Pr.*, 471.

10. *It seems*, that where the cause of action, *per se*, gives the right to arrest or imprison, although the question of such liability may be provisionally determined before judgment, yet it is to be absolutely determined by the judgment itself. *Ib.*
11. The Code has made no provision for *applying to the court or judge* for leave to issue an execution against the person. If the right exists where it is claimed under section 179 of the Code, it is without reference to any *order*, and the plaintiff may exercise the right. He will act, however, at his peril. *Supreme Ct., Sp. T.*, 1859, *Lockwood a. Van Slyke*, 18 *How. Pr.*, 45.

EXECUTORS AND ADMINISTRATORS.

1. Of the duty of executors and administrators in reference to personal property reserved for the use of the family. *Banks a. Taylor, Ante*, 199.
2. On a reference under 2 Rev. Stat., 88, § 36, of a claim against the estate of a decedent, it is not necessary that matters in defence should be set up in the agreement to refer. Every legal defence is available. [7 Wend., 522; 13 *Ib.*, 453.] The defendants standing upon their denial, in the agreement to refer, of the justice of the claim, may make any defence that the decedent might if alive, and the same were properly pleaded in an action on the claim—*e. g.*, they may avail themselves of the Statute of Limitations. 1859, *Tracy a. Suydam*, 30 *Barb.*, 110.
3. The liability of the estate of a deceased executor, for assets held by him as such at his death, is not a debt of the estate which can be referred under the provisions of the 2 Revised Statutes, 88, section 36. *Sands a. Craft, Ante*, 216.
4. The representatives of the deceased executor are bound to refuse to refer such a claim, and are not liable for costs by reason of refusal. *Ib.*
5. Payment of expenses of the real property on the order of the heir, who is also one of the next of kin, is a payment to such person as one of the next of kin. *Banks a. Taylor, Ante*, 199.
6. Distribution of proceeds of sale, &c., of real property of a decedent sold for payment of debts, under 2 Rev. Stat., 102. *Pelletreau a. Smith*, 30 *Barb.*, 494.

EXTENSION OF TIME.

7. Of the extent to which a foreign executor, taking out letters of administration in this State, is to account to the tribunals of this State. 1859, *Parsons v. Lyman*, 20 *N. Y.* (6 *Smith*), 103.
8. Actions in which executors and administrators are sole plaintiffs or sole defendants have preference in the Court of Appeals and in the Supreme Court, over all but criminal cases, and may be moved out of their order in the calendar. *Laws of 1860*, 270, ch. 167, § 1.
9. The fact that a person named as executor in the will to whom also a power of sale in trust, is given, has not qualified as executor, is not ground of ordering a sale by some person to be appointed by the court, in an action to which the grantee of the power is not a party. *Sp. T.*, 1859, *Williams v. Conrad*, 30 *Barb.*, 525.

EXTENSION OF TIME.

Though defendants show no excuse for not earlier attending to the action, and there is some color for supposing their object to have been delay, yet where they are strictly regular in the service of an order extending their time to answer, they are entitled to the benefit of the order. *Schuhardt v. Roth*, *Ante*, 203.

FALSE IMPRISONMENT.

Though the original arrest be warrantable, false imprisonment lies for any subsequent oppression or cruelty. [1 *T. R.*, 536 ; 7 *Esp.*, 332.] 1859, *Doyle v. Russell*, 30 *Barb.*, 300.

FORCIBLE ENTRY AND DETAINER.

A person in the actual and peaceable possession of land, has a right to proceed under the statute of forcible entries and detainers, although he has no legal title either of freehold or for years. [9 *Wend.*, 50.] 1859, *People v. Carter*, 29 *Barb.*, 208.

FORECLOSURE.

1. The acceptance of a deed of real estate which states that the land is conveyed "subject to a mortgage," does not make the grantee personally liable for a deficiency on foreclosure. [4 *Sandf.*, 516 ; 1 *Duer*, 412 ; limiting *Halsey v. Reed*, 9 *Paige*, 446 ; 10 *Ib.*, 595 ; 2 *Barb.*, 16 ; 2 *Sandf. Ch.*, 478 ; 2 *Barb. Ch.*, 618 ; 14 *Barb.*, 196 ; 7 *Paige*, 594 ; 2 *Den.*, 595 ; 6 *How. Pr.*, 208.] 1859, *Stebbins v. Hall*, 29 *Barb.*, 524.

FOREIGN CORPORATION.

2. The fact that when an instalment of interest became due, the mortgagor was unable to find the mortgagee until after the period required for the payment of interest, in order to prevent the principal from becoming due, is not, in the absence of any fraud shown in the plaintiff, a defence to a foreclosure of the mortgage for the payment of the principal. *So held*, on motion to be let in to defend on that ground, after judgment of foreclosure by default. *Dwight v. Webster, Ante*, 128.

3. In a foreclosure action where a part only of the defendants appeared, the issues were referred, and the referee reported in favor of the plaintiff. But there were other defendants who had not appeared, who had not submitted to the reference, nor did the report of the referee show the exact sum due.

Held, that it was regular for plaintiff to move for the relief demanded in the complaint, and for the court to order a reference to ascertain the amount due. 1859, *Hill v. McReynolds*, 30 *Barb.*, 488.

4. A foreclosure, though effected in the lifetime of the mortgagor, is not effectual to bar his wife's inchoate right of dower, unless she is made a party. *Mills v. Van Voorhies, Ante*, 152.

5. A notice of sale in a statutory foreclosure was published once in each week, for twelve successive weeks; the first publication being made eighty-five days before the sale, and the last, eight days before it.

Held, sufficient. 1859, *Howard v. Hatch*, 29 *Barb.*, 297.

6. Although the affidavits of publication and affixing the notice of sale, and of the circumstances of the sale, are to be recorded at full length by the county clerk (2 *Rev. Stat.*, 547), yet the omission to record them does not invalidate the purchaser's title. The provision on this subject is merely directory. [Overruling *Cohoes Co. v. Goss*, 13 *Barb.*, 144.] 1859, *Gen. T.*, VI. *Dist.*, *Howard v. Hatch*, 29 *Barb.*, 297.

INJUNCTION, 4.

FOREIGN CORPORATION.

An action cannot be maintained in the courts of this State by a non-resident, against a foreign corporation for a cause of action arising without the State, unless the subject of the action is situated within the State. The property attached in the action is not the subject of the action within this rule. *Supreme Ct.*, 1859, *Whitehead v. Buffalo and Lake Huron Railway Co.*, 18 *How. Pr.*, 218; and see *Campbell v. Champlain and St. Lawrence Railroad, Ib.*, 412.

FORMER ADJUDICATION.

FORMER ADJUDICATION.

1. Where a foreign corporation claims title to land in this State, an adjudication, by a court of the State in which the corporation is situated, that it has power to hold such land, is not binding upon the courts of this State. *Sp. T.*, 1859, *Boyce v. City of St. Louis*, 29 *Barb.*, 650.
2. A recovery in an action for a nuisance, is no bar to a subsequent action for the continuance of such nuisance. 1859, *Beckwith v. Griswold*, 29 *Barb.*, 291.
3. A determination of the surrogate upon the effect of an instrument does not preclude the Supreme Court from entertaining an application to reform the instrument. *Supreme Ct.*, *Sp. T.*, 1859, *Salter v. Pruyn*, 18 *How. Pr.*, 512.

FORMS.

1. Form of a sufficient complaint on a promissory note, in an action against a maker and a surety. *Osgood v. Whittelsey*, *Ante*, 134.
2. Form of a complaint in an action against the sheriff, for neglect to deliver defendant in execution to his successor. *French v. Willet*, *Ante*, 99.
3. Form of a sufficient answer by a railroad company, setting up as a defence to an action for injuries to the person of a passenger, that he was carried by them under a contract exempting them from liability. *Boswell v. Hudson River Railroad Co.*, *Ante*, 442.
4. Form of affidavit and order in supplementary proceedings against third parties under section 294 of the Code. *Seeley v. Garrison*, *Ante*, 460.

GUARANTY.

Of the diligence requisite from one who is guaranteed the collection of a debt. *Sawyer v. Haskell* 18 *How. Pr.*, 282.

GUARDIAN.

1. A guardian *ad litem* in a partition action under the Code, is to be appointed in the mode prescribed by 2 Revised Statutes, 317, §§ 2 and 11. 1858, *Althaus v. Radde*, 3 *Bosw.*, 410.
2. Though a guardian *ad litem*, or next friend, for an infant plaintiff, is entitled to have any expenses, necessarily incurred by him in the action, reimbursed out of the proceeds recovered, yet his application to the court for that purpose, must be made before the fund has been paid over by the attorney to the plaintiff. *Leopold v. Meyer*, *Ante*, 40.

HABEAS CORPUS.

3. A guardian whose ward succeeds to land subject to a mortgage, may, under 1 Revised Statutes, 749, appropriate the personal property in payment of the mortgage. *Banks v. Taylor, Ante*, 199.

INFANT, 1-3.

HABEAS CORPUS.

Upon an application for the discharge of prisoners upon habeas corpus and certiorari, the court determines the case upon the testimony taken before the committing magistrate; and if, upon that testimony, there is want of probable cause, it is the duty of the court to discharge the prisoner. *Supreme Ct., Sp. T.*, 1859, *People v. Stanley*, 18 *How. Pr.*, 179.

HIGHWAYS.

1. Of the construction of the law of highways. 1859, *People v. Supervisors of Richmond County*, 20 *N. Y. (6 Smith)*, 252.
2. The power of commissioners of highways to discontinue roads, does not extend so far as to allow them, or a jury of freeholders called by them, to review and reverse decisions of the commissioners laying out the road, especially where the decisions have been affirmed upon appeal. It is limited to roads which have, since they were laid out, become, or proved upon trial to be, useless and unnecessary. *Supreme Ct., Sp. T.*, 1859, *People v. Pike*, 18 *How. Pr.*, 70.
3. Where no ground for the application for the discontinuance of the road in question was stated in the return to a mandamus, nor did it appear by the return whether the jury of freeholders found that the road was useless and unnecessary, because there never was any occasion for it, or because the occasion for it had ceased, or it had been proved by experience to be of no public benefit or convenience,—*Held*, that the proceedings for the discontinuance of the road, as stated in the return, were a nullity. *Ib.*
4. *It seems*, that the decision of the referees, in affirming a decision laying out a road, is as conclusive for four years, as in reversing and laying out a road that the commissioners refused. *Ib.*
5. Section 5 of the act of 1853—regulating appeals in laying out and closing roads—amended. *Laws of 1860*, 899, ch. 468.
6. The provision of 1 Rev. Stat., 528, § 125—providing that any two commissioners may make an order, provided it appear in the order that all met and deliberated, or were duly notified to attend a meeting for the purpose—takes that case out of the common-law rule, that a majority may act in matters of public concern, and that it will be pre-

HOUSE OF REFUGE.

sumed that all met. An order by two is void, unless it appear in the order that all met, &c., or were notified. Parol evidence cannot cure the defect. [Following 22 Wend., 132; and disapproving 15 Barb., 471.] 1858, *Stewart v. Wallis*, 30 Barb., 344.

7. What obstruction of a highway is a nuisance. *Northrop v. Burrows*, Ante, 365.

HOUSE OF REFUGE.

Power of Managers of House of Refuge to bind out children. People on rel. *Tobano v. Governors of House of Refuge*, 18 How. Pr., 409.

IMPRISONMENT.

In an action in which a receiver had been appointed, the court granted a motion to discharge defendant from imprisonment conditionally upon his delivering the property in suit to the receiver. *Glenton v. Clover*, Ante, 422.

ARREST; FALSE IMPRISONMENT; SHERIFF.

INDICTMENT.

1. Indictments for offences on navigable waters may be found in any county through which the vessel passes, or would have passed. *Laws of 1860*, 750, ch. 431.
2. An indictment for assault and battery with intent to kill, must state the means used—that it was with a “deadly weapon,” or such other means or force as was likely to produce death—otherwise a verdict amounts only to one of assault and battery. *Supreme Ct.*, 1858, *People v. Davis*, 18 How. Pr., 134.
3. In an indictment for murder, the omission of the word “with,” in stating the instrument with which the fatal blow was given, may be regarded as a clerical mistake, if it is substantially alleged that the blow was given with the instrument. *People v. Shay*, Ante, 413.
4. An indictment for murder described the stab as made by a sword, “in and upon the body” of deceased, inflicting upon his body “one mortal wound of the breadth of one inch, and of the depth of three inches,” of which he “instantly died.” *Held*, sufficiently certain after trial and verdict. The term body, in such a connection, clearly means only that part of the human frame to which the head and limbs are attached. *Supreme Ct.*, 1859, *People v. Sanchez*, 18 How. Pr., 72.

INFANT.

INFANT.

1. The committee of an infant lunatic residing without this State, appointed under the laws of another State, cannot appear for him in an action in the courts of this State; nor, without service of summons upon the infant, proceed to have a guardian *ad litem* appointed for him. *Rogers v. McLean, Ante, 306.*
2. The objection that an infant lunatic who was a necessary party to the action, was not served with summons, but was thus proceeded against, is a defect which cannot be cured except by a new action; and the purchaser under the judgment cannot be compelled to take the title. *Ib.*
3. Under the provisions of 2 Revised Statutes, 194, § 170—authorizing infants to apply, by next friend or guardian, to the court for the sale, &c., of their real property—an appointment of a next friend to present the petition is not necessary. The court may proceed upon a petition presented by the natural guardian—*e. g.*, the mother of the infants. *Matter of Whitlock, Ante, 316.*
4. A marriage settlement is not void because the parties are infants, but voidable only at the option of the infants on arriving at age. If they do not, within a reasonable time, seek to avoid it, they will be deemed to have ratified it. The trustee under the settlement cannot raise such objection against a claim for an accounting. *Sp. T., 1859, Jones v. Butler, 30 Barb., 641.*
5. Infancy is no defence to an action for injuries caused by the wrongful act of the infant. 1859, *Conklin v. Thompson, 29 Barb., 218.*

INJUNCTION.

1. The passage of a resolution by the Common Council of a municipal corporation, is a legislative act, and cannot be enjoined. *People v. Mayor, &c., of New York, Ante, 143.*
2. But an injunction may be granted to prevent such a resolution from being carried into effect, after it is passed. *Ib.*
3. An injunction cannot be granted in an action between individuals to try the right to office in a religious corporation. The remedy is by an action in the nature of a *quo warranto*. *Hart v. Harvey, Ante, 321.*
4. On an application to continue a temporary injunction under section 129 of the Code of Procedure, the court will inquire into the question whether they have power to grant the relief demanded. *Ib.*
5. Leasehold premises, subject to a mortgage, were sold on execution under a judgment prior thereto, and the certificate of sale was assigned

INJUNCTION.

to the owner of the equity of redemption of the mortgaged premises. The mortgage having been foreclosed, and a decree of sale obtained, the owner of the equity of redemption brought an action to settle the rights of the parties, and asked for an injunction to stay the sale.

Held, that the injunction should be denied. 1. The plaintiff's interest as owner of the equity of redemption was undoubtedly subject to the mortgage; and the fact that he held a title under the sheriff's sale, did not alter the rights of the parties in the other estate.

2. The plaintiff in the foreclosure was not limited to redeeming as a mortgage creditor.

3. The fact that the estate foreclosed was small and rapidly expiring, was a reason for not delaying the sale. *New York Shot Lead Co. v. Cary*, *Ante*, 44.

6. A municipal corporation commenced proceedings for opening a street, and resolved to take certain land for that purpose. Commissioners were duly appointed to appraise the owner's damages, who awarded him one dollar only, on the ground that the land had been, more than twenty-five years before, dedicated to the public use as a street; although ever since held by the grantees of such dedicatory, without any claim by the public. The land was worth \$1,200. The proceedings were entirely regular on their face. An action was thereupon brought by the owner to restrain the corporation from taking the land.

Held, 1. That the objection could not have been raised by certiorari.

2. That the owner was entitled to a perpetual injunction. *Baldwin v. City of Buffalo*, 29 *Barb.*, 396.

7. Such an action may be maintained, whenever, 1. The proceedings in the subordinate tribunal will necessarily lead to a multiplicity of actions; 2. Where they lead in their execution to the commission of irreparable injury to the freehold; and, 3. Where the claim to the land is valid on the face of the proceedings, and extrinsic facts must be proved to show its illegality. [14 *N. Y.*, 534; 26 *Wend.*, 132.] *Ib.*
8. *It seems*, that an action might be brought, in such cases, to set aside the proceedings. *Ib.*
9. Assignees who are solvent and responsible and acting in good faith, should be permitted, pending a suit to direct the distribution of the assets, to go on and collect outstanding demands. 1858, *Spring v. Strauss*, 3 *Bosw.*, 607.
10. Grounds of granting an injunction and receiver in an action by the master of a vessel or his assignee, &c., to enforce a lien for advances. *Sorley v. Brewer*, 18 *How. Pr.*, 276.
11. Where an injunction is granted on a verified complaint, service of a

INQUEST.

copy of the complaint with the injunction, is service of a copy of the affidavit on which it was granted within section 220 of the Code. *Leffingwell a. Chave, Ante, 472.*

12. Though an injunction-order cannot become operative until the action is actually commenced by service of summons, it may be granted before service of summons, so as to operate as soon as the action is commenced. *Ib.*
13. Injunction before judgment, dissolved on ground that the defendant's affidavit denied the right. *Wolfe a. Goulard, 18 How. Pr., 64; Gould a. Jacobsohn, 18 Ib., 158.*
14. A preliminary injunction cannot be sustained when all the equities of the complaint are denied by the answer. [7 Abbotts' Pr., 322.] *Supreme Ct., Sp. T., 1859, Finnegan a. Lee, 18 How. Pr., 186.*

INQUEST.

Motion to open an inquest taken under peculiar circumstances by an attorney who claimed a lien for costs, notwithstanding the settlement of the parties,—denied. *Owen a. Mason, 18 How. Pr., 156.*

INSOLVENT.

1. The officer acquires no jurisdiction, and his discharge is void, if an affidavit of a petitioning creditor, on which the proceeding is founded, merely states that the sum annexed to his name was justly due to him from the insolvent for two promissory notes, specifying their respective amounts. This is not a statement of the nature, ground, and consideration of the indebtedness, within 2 Rev. Stat., 199, § 7. *N. Y. Com. Pl., 1859, Gillies a. Crawford, 2 Hilt., 338.*
2. In proceedings by an insolvent, to obtain discharge from debts, under the Revised Statutes, service of a notice without signature, of an order requiring creditors to show cause why a discharge should not be granted, which notice states an order made by another officer than the one before whom the proceedings was pending—is insufficient; and the defect is not cured by the discharge. *People on rel. Demarest a. Gray, Ante, 468.*
3. An insolvent is not entitled to his discharge from an indebtedness which arose from his embezzlement of money and evidences of debt, which came to his possession as a clerk in the course of his employment as such; but this must be clearly shown; the mere statement in the petition that the demand arose when he was clerk of the creditors, for money, &c., which he had in his possession, and did not

JOINDER OF ACTIONS.

account for, and appropriated to his own use, is not sufficient ground for denying the discharge. *Matter of Pie, Ante, 409.*

JOINDER OF ACTIONS.

1. Where a complaint against two defendants alleged that one of them erected a building across an alley of the plaintiff, and thus obstructed his right of way; that such defendant then transferred the building to the other defendant, who continued the obstruction; and prayed judgment against both defendants.

Held, 1. That the complaint stated a good cause of action against each defendant separately. *2.* That the causes of action were distinct, the continuance of the nuisance being a fresh nuisance. *3.* That the complaint was bad on demurrer, as improperly joining causes of action. *4.* That the defendants might demur jointly. 1859, *Hess v. Buffalo & Niagara Falls, and New York Central Railroad Cos.*, 29 *Barb.*, 391.

2. *It seems*, that the defendants might have moved to compel the plaintiff to elect which cause of action he would prosecute. *Ib.*
3. *It seems*, that an action upon a note, against A., could not be united with an action upon another note, against B. *Ib.*

JOINT DEBTORS.

Where the circumstances under which judgment against several joint debtors was obtained on service of summons upon one only, were such as to countenance suspicion that it was obtained by connivance of the defendant served—it was opened on motion of another defendant, to let in his defence. *Cleveland v. Porter, Ante, 407.*

JUDGMENT.

1. After an order dismissing plaintiffs' complaint with costs to defendants, although defendants cannot enter judgment for default in payment of the costs, they are entitled to leave to enter it on motion for that purpose. *Hicks v. Brennan, Ante, 420.*
2. On demurrer to answer, the court overruled the demurrer, furnishing a brief direction, "judgment for defendants, with leave to plaintiff to withdraw the demurrer, &c., in twenty days, on payment of costs." Upon this direction, the attorneys for the defendants entered judgment for costs, without dismissing the complaint. Its caption was, "Judgment signed, October 8th, 1858." The language was, "It is adjudged that the defendants recover of the plaintiff the sum of \$37 65, for their costs and disbursements in this action."

JUDGMENT.

Held, irregular. The Code declares, "A judgment is the *final* determination of the rights of the parties in an action." (§ 245.) By section 400, "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." By section 349, an appeal is given from an *order*, "when it sustains or overrules a demurrer." The defendant's attorneys should not have attempted to enter a judgment in this case, unless they understood the court as deciding that the matter pleaded constituted a complete bar, and then the judgment should have been final, dismissing the complaint, so that the plaintiff could have appealed from it as a judgment, and if affirmed on appeal, then could appeal to the Court of Appeals. *Supreme Ct.*, 1859, *Wightman v. Shankland*, 18 *How. Pr.*, 79.

3. Where, on a recovery of a money-demand by the plaintiff, the defendant is entitled to costs, the costs should be set off against the plaintiff's recovery, and there should be but one judgment entered and execution awarded, for the excess of the one over the other, to whichever party it belongs. *Johnson v. Farrell*, *Ante*, 384.
4. When, in such a case, defendant entered a judgment for his costs, and plaintiff's application to have the judgment set aside was refused by the court—

Held, That the judgment should be reversed on appeal, and the proceedings remitted. *Ib.*

5. *It seems*, that the order denying the motion to set aside the judgment would be appealable. *Ib.*
6. In an action upon a penal bond, the judgment should be, in form, for the penalty, and the court should control the execution. The Code has not altered the former practice in this respect. 1859, *Western Bank v. Sherwood*, 29 *Barb.*, 383.
7. That a mere irregularity, which the court may correct, cannot be regarded in a collateral proceeding. *Althause v. Radde*, 3 *Bosw.*, 410.
8. Though an order vacating a judgment which has been docketed destroys the lien thereof, yet if the order is vacated, the lien as well as the judgment is revived; except as against parties dealing with the real property of the judgment-debtor, after the entry of the order, as *bona-fide* purchasers, or incumbrancers, and except that all persons commencing actions affecting the property are at liberty to act as if the judgment had never been docketed; the subsequent reversal of the judgment does not affect them or their proceedings. 1859, *King v. Harris*, 30 *Barb.*, 471.
9. An assignee of a justice's judgment may sue upon it without leave. [1 *Abbotts' Pr.*, 84; 4 *Ib.*, 441; 12 *How. Pr.*, 540.] *N. Y. Com. Pl.*, 1858, *Kopper v. Howe*, 2 *Hilt.*, 69.

JUDGMENT.

10. Of the proper application of proceeds of an execution on a judgment confessed by way of indemnity for several debts, where the rights of other creditors have intervened. *Thomas v. Kelsey*, 30 *Bosw.*, 268.
11. An action to set aside a judgment on the ground of its being contrary to equity, cannot be maintained unless the party was ignorant of the fact relied on, pending the suit, or it could not have been received as a defence, or he was prevented from availing himself of the defence by fraud or accident, or by the act of the opposite party, unmingled with negligence or fraud on his part. *Hamel v. Grimm*, *Ante*, 150.
12. A complaint in such an action, founded on the fact that the judgment recovered was based on the testimony of the adverse party that an instrument in question, which was lost, was a mortgage, whereas it had since been found and proved to be absolute—is not sufficient to show a cause of action, unless it also states that upon the trial the party did not know its contents, or that he offered himself as a witness. *Ib.*
13. Plaintiff was a grocer, and defendant resided with his family in his vicinity. Defendant's confession of judgment stated that a part of the indebtedness arose on his promissory note, dated May 1, 1856, given by defendant to plaintiff, for "groceries, goods, and merchandise furnished to me before that time by the plaintiff, and from his store," and specified the amount of interest due.
Held, insufficient, as not showing within what period the goods were furnished, nor the facts on which interest could be claimed. *McKee v. Tyson*, *Ante*, 392.
14. A part of the indebtedness was said to be "for groceries, goods, and merchandise furnished to me since the 1st day of May, 1856, by the plaintiff, from his store." The statement was dated March 31, 1857.
Held, that these dates, and the nature of the goods sold, as stated, sufficiently disclosed the facts out of which this part of the indebtedness arose. *Ib.*
15. The statement for a judgment by a confession was as follows:.
"The above indebtedness arose on a promissory note, made by the defendants to the plaintiff, dated June 21st, 1854, in the sum of seven hundred dollars, with interest; that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of seven hundred and eighty-two dollars and seven cents; together with eighty dollars and forty-one cents, now due the plaintiff from the defendants as costs in an action brought against the defendants by the plaintiff upon said promissory note, in the Supreme Court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendants."

JUDGMENT.

Held, sufficient, there being no pretence that the money secured was not justly due. The words "being had," should be construed with reference to the date mentioned. *Supreme Ct.*, 1858, *Freleigh a. Brink*, 18 *How. Pr.*, 89; reversing *S. C.*, 16 *Ib.*, 272.

16. It is not necessary that a confession of judgment should state in terms that the amount for which judgment is entered, "is due or to become due." The facts from which the law draws such a conclusion need alone be stated. 1859, *Lanning a. Carpenter*, 20 *N. Y.* (6 *Smith*), 447, 458.

17. After showing an indebtedness to have arisen, it is not necessary to aver that the debt has not been paid or discharged. *Ib.*

18. The following statement *held* sufficient:

"This confession of judgment is for indebtedness from me to L., arising out of the following facts, viz.: On one promissory note, given by me to said L., on the 8th day of December, 1854, for \$100, borrowed money, on which is indorsed \$11 60; said note due when given. Also, one promissory note of \$340, made by me, and dated Oct. 17, 1854, due when given, and now owned by said L., the same being given for borrowed money. Also, for the said L. assuming the payment of the sum of \$1,000 at the Bank of H., on July 14, 1855 by which a note of \$1,000, made by me, payable to the order of S. C., at the said H. Bank, dated May 31, 1855, and indorsed by said S. C. and D. J. S., was paid and taken up. Dated, July 14, 1855." *Ib.*

19. The statement must show that the sum confessed does not exceed the debt. It is not enough that it state that the confession is for a debt justly due and owing, for money lent, &c., or for goods sold, &c., without stating the amount of the loan, or the total price. 1859, *Clements a. Gerow*, 30 *Barb.*, 325.

20. The right to set aside a judgment by confession, which is void for insufficiency of the statement on which it is entered, is not limited to judgment-creditors, but extends to any creditors whose rights are affected. A grantee or mortgagee of premises upon which the judgment is a lien may attack and resist, in defence of any action to which they are parties, any such judgment, where the same is sought to be enforced by suit upon the judgment by the plaintiff, as well as they might move to vacate the judgment, or bring an action for the same purpose. *Supreme Ct.*, 1859, *Norris a. Denton*, 30 *Barb.*, 117.

21. Although a judgment entered by confession may be set aside on *motion*, when the statement is insufficient, yet such relief may also be obtained as part of the judgment in a creditor's action. 1859, *Jessup a. Hulse*, 29 *Barb.*, 539.

22. If a judgment taken by confession upon a defective statement can

JUDICIAL SALE.

be amended, it can only be as to the rights of the parties to the judgment, and without prejudice to those of other judgment-creditors. *Ib.*

AMENDMENT, 6, 10; FORMER ADJUDICATION.

JUDICIAL SALE.

1. A sale of a decedent's real property at a judicial sale, does not convert it into personalty; and an application to the court by a creditor for payment of the surplus, must be founded on an order of the surrogate for the sale of decedent's real property, and payment of the applicant's demand. *Hoey v. Kinney, Ante, 400.*
2. The rule, that where property is sold at a judicial sale without reservation, or notice of defect in title, the purchaser will not be compelled to take the title if it prove defective or doubtful—applies to sales under the judgments of the Supreme Court. *Rogers v. McLean, Ante, 306.*
3. The purchaser, on being discharged on account of defects in the title, is entitled to receive a return of his deposit, with interest from the time the sale was to be completed, and the expenses of investigating the title, and the costs of his motion to be discharged. *Ib.*
4. A reservation or covenant that five feet of the front of a lot shall not be built upon or used except for steps, &c., is an incumbrance, and entitles the purchaser at a judicial sale, free of incumbrance, to be discharged. *Matter of Whitlock, Ante, 316.*
5. On appeal from an order discharging the purchaser at a judicial sale, and directing his deposit to be repaid, the court refused to consider the merits of the order appealed from; but the purchaser not being shown to be irresponsible, the court refused to stay the repayment of his deposit. *Rogers v. McLean, Ante, 458.*

JURISDICTION.

1. The courts of this State should not assume jurisdiction of an action between foreign corporations of another State not doing business within this State, on a cause of action arising in that State, respecting property situated in that State. *Supreme Ct., 1859, Cumberland Coal Co. v. Hoffman Coal Co., 30 Barb., 159; affirming S. C., 8 Abbotts' Pr., 243.*
2. The fact that the goods to recover possession of which an action is brought in a State court, are detained under claim by a quasi government-official of the United States,—e. g., the keeper of a bonded warehouse,—where the government makes no claim in respect to goods, does not constitute any objection to the jurisdiction of the court. *McButt v. Murray, Ante, 196.*

JURORS.

3. The testator devised real property both in New York and in Missouri to a municipal corporation of Missouri.

Held, 1. That the capacity of the corporation to take as to the lands in this State, might be determined in a partition suit in a court of this State, among the parties interested.

2. That the capacity of the corporation was to be determined in respect to the lands within this State, by the courts of this State, upon a construction of its charter; and that an adjudication of the courts of Missouri upon this question was not conclusive. *Supreme Ct., Sp. T.*, 1859, *Boyce v. City of St. Louis*, 29 *Barb.*, 650; *S. C.*, 18 *How. Pr.*, 125.

4. Of the jurisdiction of a surrogate of this State over a foreign executor taking out letters of administration here. *Parsons v. Lyman*, 20 *N. Y. (6 Smith)*, 103.

JURORS.

1. Fees of, may be increased by the Board of Supervisors. *Laws of 1860*, 216, ch. 136.
2. One of the jurors being challenged, said that "he had read part of the statements in the papers at the time of the homicide, and had formed a preconceived idea in regard to the prisoner's guilt or innocence, but had no bias one way or the other; that his preconceived idea or impression would in no way influence his verdict, but he would be governed entirely by the evidence produced on the stand."

Held, that he was impartial within the meaning of the law requiring jurors to be persons of "sound judgment and well informed," and properly allowed to be sworn. *Supreme Ct.*, 1859, *People v. Sanchez*, 18 *How. Pr.*, 72.

JUSTICES' COURTS.

I.—*Jurisdiction.*

1. Sections 53 and 62 of the Code of Procedure amended. *Laws of 1860*, 209, ch. 131; 784, ch. 459, § 2.
2. A constable's return may be indorsed by the justice on the summons, under the direction and in the presence of the constable. [20 *Johns.*, 63; 9 *Geo.*, 325.] 1859, *Reno v. Pinder*, 20 *N. Y. (6 Smith)*, 298.
3. The constable's return is not necessary to give a justice jurisdiction. If service of the summons is proved in any way, it is sufficient. *Ib.*
4. Whether an action on the official bond of an executor or administrator is an action against the executor or administrator as such, within section 54 of the Code, excluding justices' courts from cognizance of such actions,—*Query?* *Mahony v. Gunter*, *Ante*, 431.

JUSTICES' COURTS.

II.—Attachment.

1. The return by a constable of a warrant issued by a justice under the non-imprisonment act must specify the mode of executing the writ, specifically stating whether a copy was personally served on defendant or not. If he cannot be found in the county, it should state that the constable left a certified copy of the attachment and inventory at his last place of residence, specifying it. 1858, *Watts a. Willett*, 2 *Hilt.*, 212.
2. A bond given in a justice's court on obtaining an attachment, was conditioned for payment of all damages and costs sustained by reason of such attachment, in case the plaintiff should fail to recover judgment thereon.

Held, 1. That the condition was not satisfied by a judgment in favor of the plaintiff in the justice's court, which was reversed on certiorari. The judgment must be final. [21 *Wend.*, 270.]

2. That the obligors were liable for the costs of the certiorari. 1859, *Bennett a. Brown*, 20 *N. Y.* (6 *Smith*), 99.

3. A bond having been given to a justice to procure an attachment under Laws of 1831, 403, § 33, upon his promise to return it in case it was not required by law, he granted the attachment, and afterwards, in the belief that no bond was necessary, returned it to the obligors, and it was destroyed. The Court of Appeals having held [4 *Comst.*, 254] that the bond was necessary,

Held, that notwithstanding the destruction of the bond, the obligors were liable upon it. *Ib.*

III.—Appearance.

1. One who is deputed to serve the process in the cause, is precluded from acting as attorney in the cause, by the provision of the statute (2 *Rev. Stat.*, 4th ed., 34, § 42), prohibiting the constable who serves process from acting as attorney. *Supreme Ct.*, 1859, *Knight a. Odell*, 18 *How. Pr.*, 279.
2. The president of a corporation, who appears on their behalf in a suit against them in a justice's court, is to be regarded as their attorney in fact; and his authority to do so will be assumed till the contrary is shown. 1859, *Oakley a. Working Men's Union Benevolent Society*, 2 *Hilt.*, 487.
3. Though after an insufficient execution of a warrant of attachment, the appearance of the defendant gives the justice jurisdiction, it does not render the attachment valid as against execution-creditors. 1858, *Watts a. Willett*, 2 *Hilt.*, 212.

JUSTICES' COURTS.

IV.—*Pleadings.*

1. The omission of plaintiff to aver damages, in his complaint, is waived by defendant's going to trial without objection. 1859, *Neary v. Bostwick*, 2 *Hilt.*, 514.
2. The plaintiff may declare for a different cause of action than that mentioned in the summons; and if it has been personally served, it is the duty of the defendant to appear on the return-day and take his objections, or judgment may be entered against him. 1859, *Reno v. Pindar*, 20 *N. Y.* (6 *Smith*), 298.
3. In an action in a justice's court on a judgment recovered in a justice's court, the complaint showed that the judgment had been docketed with the county clerk. The answer claimed that the action could not be maintained, because "under the provisions of the Code, no action can be maintained on a judgment of the county court."

Held, a sufficient statement of the objection that leave of court was necessary. *Lyon v. Manly*, *Ante*, 337.

V.—*Trial.*

1. Section 64 of the Code regulating proceedings in justices' courts, amended by adding at the end:

The defendant may, on the return of process, and before answering, make an offer in writing to allow judgment to be taken against him for an amount to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceedings shall be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer. *Laws of 1860*, 784, ch. 459, § 3.

2. An adjournment by the clerk made before the time for which the cause was set down, and without consent of both parties, is unauthorized, and amounts to a discontinuance. 1858, *Mayor, &c., of N. Y. v. Husson*, 2 *Hilt.*, 7.
3. In a justice's court, although the defendant does not appear, the plaintiff must establish his cause of action by legal evidence. [13 *Wend.*, 85; 14 *Ib.*, 159; 1 *Den.*, 432; 4 *Ib.*, 184, 460.] 1859, *Perkins v. Stebbins*, 29 *Barb.*, 523.
4. It is competent for a party in an action in a justice's court, who has

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demand a trial by jury, to waive that mode of trial by consent in open court. *Horsford v. Carter*, *Ante*, 452.

5. Where two persons are improperly joined as plaintiffs, the defendant is entitled to a nonsuit. A demurrer will not lie for such cause in a justice's court. [Code, § 64, subd. 6.] 1859, *Ackley v. Tarbox*, 29 *Barb.*, 512.

VI.—*Appeal.*

1. On appeal from a justice's court under sections 353 and 366 of the Code, the appellate court must hear at the same time and pass upon all the questions, both those of error in law and of error in fact, and of a motion for a new trial. *Cook v. Swift*, *Ante*, 212.
2. Where the appellate court refused to hear argument upon the whole case at the same time, requiring the appellant to argue his motion for a new trial before proceeding with the case, or lose the benefit of it, the Supreme Court reversed the judgment and left the cause pending upon the appeal in that court, to be proceeded with anew. *Ib.*
3. An action having been brought for conversion of personal property, the defendant put in a general denial. The justice's return stated that he "entered judgment for damages, with costs, \$2.74," without saying in whose favor.

Held, 1. That it must be presumed that the justice gave judgment for the plaintiff for some amount of damages, with \$2.74 costs, since no damages were claimed by the defendant.

2. That on appeal by the plaintiff, the court could not say that the damages awarded were too small, since it did not appear how much they were. 1859, *Slaman v. Buckley*, 29 *Barb.*, 289.

4. In the absence of evidence to the contrary on the trial before the justice, the appellate court will presume in determining the question of limitations that the summons was issued on the same day on which it was served, notwithstanding the justice states in his return that it was issued on a previous day. 1859, *McGraw v. Walker*, 2 *Hill.*, 404.
5. What objections in an action in a justice's court to recover penalties for violations of the excise law, must be taken before that court, and cannot be first raised on appeal. *Pruyn v. Tyler*, 18 *How. Pr.*, 331.
6. The appeal under the Code from a justice's judgment to the county court (Code, § 351) does not supersede the justice's judgment, nor does the county court proceed *de novo* with a trial. But the appellate jurisdiction is merely of errors in the court below; the judgment is merely of affirmance or reversal; and the whole proceedings are like those formerly had on certiorari. [2 *Sandf.*, 634.] The judgment of the justice remains a valid judgment. It is a fixed right, and not affected by

JUSTICES OF THE PEACE.

an act repealing the statute on which the action was founded. [2 Comst., 182.] *Supreme Ct.*, 1859; *Pruyn v. Tyler*, 18 *How. Pr.*, 331.

7. Judgment of the justice on conflicting evidence sustained. *Barber v. Arnoux*, 18 *How. Pr.*, 285; *Mendell v. French*, 2 *Hilt.*, 178.

JUSTICES OF THE PEACE.

Fees of justices of the peace in civil and in criminal cases. *Laws of* 1860, 983, ch. 493.

LIMITATIONS.

1. The statute of limitations regarded as a meritorious defence when invoked by executors and other persons entirely ignorant of the facts. *Tracy v. Suydam*, 30 *Barb.*, 110.
2. A debt secured by a sealed mortgage and an unsealed note can be enforced by foreclosure of the mortgage after the expiration of six, but before the expiration of twenty, years from the time when the debt became due. [7 *Paige*, 465; 19 *Pick.*, 535; 4 *Cush.*, 599; 8 *Metc.*, 535; 2 *Conn.*, 163; 14 *B. Monr.*, 307; 2 *Cox Ch. Cas.*, 125; 3 *Esp.*, 91, 82; *Hilliard on Mortg.*, 21, 22; 14 *N. Y.*, 16; 14 *Pet.*, 19; overruling *Jackson v. Sackett*, 7 *Wend.*, 94.] 1859, *Pratt v. Huggins*, 29 *Barb.*, 277.
3. The statute of limitations does not apply to foreign corporations. They are included in the exception made against persons absent from the State. [2 *R. S.*, 497, § 27; *Ib.* 778, § 11; overruling *Faulkner v. Delaware and Raritan Canal Co.*, 1 *Den.*, 441.] 1859, *Olcott v. Tioga Railroad Co.*, 20 *N. Y.* (6 *Smith*), 210.
4. In order to sustain a claim to land by adverse possession, an actual occupancy or substantial inclosure must be proved. But a *natural* boundary is sufficient inclosure. Thus, a range of rocks 200 to 400 feet high was *held* sufficient to sustain a claim of inclosure on that side, without the erection of a fence. [5 *Cow.*, 216.] 1858, *Beecker v. Van Valkenburgh*, 29 *Barb.*, 319.
5. It is settled in this State that an acknowledgment or promise to pay a debt, or a part payment made by one of several partners after dissolution of a firm, or by one of joint and several debtors, will not renew the debt against the others, under the statute of limitations. [18 *N. Y.*, 558; 1 *Kern.*, 176; 2 *Comst.*, 524.] 1859, *New York Life Insurance Co. v. Covert*, 29 *Barb.*, 435, 441.
6. The proper mode of defence under a presumption of payment (2 *Rev. Stat.*, 301, § 48) is by pleading payment. [3 *Den.*, 314; 2 *Barb.*, 488; 5 *Johns. Ch.*, 545; 3 *Sandf.*, 22; 8 *Barb.*, 250.] *Ib.*
7. By proceeding to foreclose a mortgage by advertisement, the mortga-

MALICE.

gee acknowledges the mortgagor's right to redeem, and loses the benefit of an adverse possession of twenty years. 1859, *Calkins v. Isbell*, 20 *N. Y.* (6 *Smith*), 147.

MALICE.

What is meant by the term *malice* explained; and the dictum, in *Brommage v. Prosser* (4 *B. & C.*, 247), that there are two kinds in actions for defamation, and a distinction between the word in its popular and in its legal sense, declared to be erroneous. *Viele v. Gray*, *Ante*; and see *Etchberry v. Levielle*, 2 *Hill*, 40.

MALICIOUS PROSECUTION.

On motion to discharge from arrest in an action for malicious prosecution it is sufficient if the plaintiff shows *prima facie* a sufficient cause—*e. g.*, an immediate dismissal by the magistrate, of the prosecution. *Gould v. Sherman*, *Ante*, 411.

MANDAMUS.

1. Any citizen, may be a relator, in an application for a mandamus to enforce the execution of an act of the Legislature, passed for the benefit the public. [19 *Wend.*, 65; 1 *How. Pr.*, 186.] *So held*, on an application for mandamus to compel publication of the Statutes. *Supreme Ct.*, *Sp. T.*, 1860, *People ex rel. Fuller v. Supervisors of Seneca*, 18 *How. Pr.*, 461.
2. Since the enactment of ch. 174, Laws of 1859, judgments upon mandamus are reviewed in the Court of Appeals upon *appeal*, and not by writ of error. [Distinguishing *Becker v. The People*, 18 *N. Y.*, 487.] 1859, *People ex rel. Bender v. Church*, 20 *N. Y.* (6 *Smith*), 529.

MARINE COURT.

1. It is within the discretion of the New York Marine Court, to allow an amendment of the summons on its return—*e. g.*, by striking out the words "a money-demand on contract," and substituting "injury to personal property." 1858, *Cooper v. Kinney*, 2 *Hill*, 12.
2. On appeal in the New York Marine Court, from a single judge to the general term, no undertaking is necessary. *Robert v. Donnell*, *Ante*, 454.

MARRIED WOMEN.

1. A married woman, though doing business on her own account, and though her husband had abandoned her, is not liable in a mere action

MECHANICS' LIEN.

- for damages for breach of contract. *N. Y. Com. Pl.*, 1859, *Morgan a. Andrut*, 18 *How. Pr.*, 371.
2. Husband held liable on contracts made by him as agent of his wife. *Marsh a. Hoppock*, 3 *Bosw.*, 478.
 3. Married woman may hold property, collect rents, bargain, sell and transfer, separate personal property, and with consent of her husband, on order of the county court, may convey her separate real property. May sue and be sued as if sole, and may recover to her own use for injuries to her person or character. *Laws of 1860*, 157, ch. 90.
 4. When a general statute (*e. g.*, *Laws of 1851*, ch. 513), gives a lien against all owners who may become parties to certain contracts, married women as well as all others are included. 1859, *Hauptman a. Catlin*, 20 *N. Y.* (6 *Smith*), 247.

MECHANICS' LIEN.

1. Parties furnishing labor or materials under a general employment may acquire a mechanics' lien therefor. 1859, *Smith a. Coe*, 2 *Hilt.*, 365.
2. The lien creditor succeeds only to the rights and claims which at the time are possessed by the original contractor, and no other or greater. *Ib.*
3. G., being owner in fee of four lots in the city of New York, agreed with F., by a contract in writing under seal, to sell such lots to him, and to make a building loan thereon, upon condition that if there were any failure on the part of F. to fulfil his part of the agreement, the interest of F., his heirs, and assigns in the premises should cease. The agreement provided that F. should build six houses on the lots, and that if there should be any mechanics' lien on the premises, G. might apply the advances to the payment thereof; and when the buildings were completed, G. was to convey to F. on payment of a sum specified.
Held, that neither F. nor one claiming under him by virtue of a second contract had, without fully performing the contract, any interest which is the subject of a mechanics' lien. *Randolph a. Garvey*, *Ante*, 179.
4. A notice under § 6 of ch. 513, *Laws of 1851*, need not state who made the contract for the work for which a lien is claimed. 1859, *Hauptman a. Catlin*, 20 *N. Y.* (6 *Smith*), 247.
5. A notice of lien upon a married woman's estate is not vitiated by joining her husband's name with hers, though *it seems* it is not necessary to do so. *Ib.*
6. Of the form of judgment under the act of 1851 (ch. 513), prior to the amendment of 1855 (ch. 404). *Ib.*
7. The lien law of 1851 is applicable to work contracted for, but not executed, prior to its enactment. *Ib.*

MISNOMER.

8. The service on the owner of the claimant's notice to appear and submit to an accounting, is in effect the commencement of a suit. *Sp. T.*, 1859, *Brown v. Wood*, 2 *Hill.*, 579.
9. The fact that the bill of particulars served is not sufficiently specific, is no ground for setting aside the proceedings. A further bill may be required. *Ib.*
10. If the owner, against whose property a mechanics' lien is filed for a claim justly due, does not protect himself by depositing the amount with the county clerk, he will be liable for costs of proceedings to foreclose the lien. *Williamson v. Hendricks*, *Ante*, 98.
11. *It seems*, that it would be otherwise if the amount claimed in the notice of lien were reduced on the trial. *Ib.*

MISNOMER.

1. An individual banker commenced an action in his banking name. *Held*, a misnomer. An individual banker is not a corporation sole. [19 *N. Y.*, 37.] 1859, *Bank of Havana v. Magee*, 20 *N. Y.* (6 *Smith*), 355.
2. The proper remedy against a misnomer is by motion to set aside the proceedings. It cannot be reached by answer or demurrer. *Ib.*
3. Upon the trial, a misnomer should be amended, and, if it has not misled, without terms. *Ib.*

MISTAKE.

1. Equity does not relieve against a contract on the ground of mistake, except where the mistake is in the instrument, so that it can be reformed to express the true intention of both parties. A misunderstanding of the parties by which there was a want of concurrence of minds upon the conditions of the contract, but without mistake in the instrument, is not matter of relief. *New York Ice Co. v. Northwestern Insurance Co.*, *Ante*, 34.
2. In an action for the reformation of a written agreement, on the ground of mistake, no fraud being proved, the following rules are observed :
 1. The mistake must be plain, and clearly proved.
 2. It must have been a *mutual* mistake.
 3. The mistake must be of fact, not of law.
 - And mistake as to the meaning of language is a mistake of law.
 4. It must be clearly shown to the court what the real contract was. If any doubt be left on this point, the written contract cannot be disturbed.
 [1 *Story's Eq. Jur.*, §§ 155 to 166 ; 2 *Johns. Ch.*, 51, 274, 585, 630 ; 6 *Ib.*, 169, 170 ; 11 *Paige*, 658 ; 17 *Johns.*, 377 ; *Hopk.*,

MOTIONS AND ORDERS.

134 ; 1 Br. C. C., 347.] *Sp. T.*, 1859, *Kent v. Manchester*, 29 *Barb.*, 595.

MOTIONS AND ORDERS.

1. Notice of motion to set aside a judgment for irregularity on the ground that it is improperly entered, sufficiently specifies the objection that the judgment was entered without authority. *Hicks v. Brennan*, *Ante*, 304.
2. Where defendant moves to vacate an attachment solely on the original affidavits, plaintiff cannot offer new affidavits in resisting the motion, even to show as a preliminary objection that the defendants have parted with their interest in the property attached. *Dickenson v. Benham*, *Ante*, 390.
3. Where plaintiff inadvertently neglected to file the undertaking given on his part on obtaining an injunction, until after notice of motion to dissolve it upon that ground, the court relieved him by sustaining the injunction, notwithstanding the delay in filing, upon his payment of the costs of the motion. *Leffingwell v. Chave*, *Ante*, 472.
4. An order for the trial of questions of fact by a jury, must be made before the cause has been actually tried. *O'Brien v. Bowes*, *Ante*, 106.

AMENDMENT, 3, 7, 8.

MUNICIPAL CORPORATION.

1. An incorporated village (formed under the act of 1847), though not expressly authorized to sue, has authority to do so by virtue of its general power as a corporation. 1860, *Village of Warren v. Philips*, 30 *Barb.*, 646.
2. Proceedings given to compel attendance of witnesses before committees of Common Councils in cities. *Laws of 1860*, 48, ch. 39.
3. Of the construction of the specifications in public contracts. *People v. Mayor, &c.*, of New York, *Ante*, 144.

NAME.

1. In what cases and on what grounds an application for a change of name may be granted. *Matter of Snook*, 2 *Hilt.*, 566.
2. Act of 1847, ch. 464,—allowing certain courts to change names of persons,—amended by extending it to the county courts, and in the city of New York to the Common Pleas. *Laws of 1860*, 125, ch. 80.

NE EXEAT.

1. A writ of *ne exeat* allowed under the Code. *Glenton v. Clover*, *Ante*, 422.

NEGLIGENCE.

2. A denial of any intention of leaving the State, is not of itself a sufficient ground for discharging a writ of *ne exeat*. *Ib.*

NEGLIGENCE.

What facts constitute negligence in the parties to a railroad collision. *Bernhardt v. Rensselaer and Saratoga Railroad Co.*, 18 *How. Pr.*, 427.

CAUSE OF ACTION; EVIDENCE, *tit. In Particular Actions*.

NEW YORK CITY.

1. An act in relation to police, and criminal and police courts in the city of New York. *Laws of 1860, 1007, ch. 508.*
2. Supreme Court in the first district, and the New York Common Pleas and Superior Court, have exclusive jurisdiction in actions and special proceedings wherein the City Corporation are a party defendant. *Laws of 1860, 645, ch. 379, § 1.*
3. No action or special proceeding to be maintained against the city unless it is alleged in the complaint or moving papers that 20 days have elapsed since the claims in question were presented to the comptroller, and also that upon a second demand, in writing, being made upon him after that 20 days, he neglected to make adjustment or payment. If plaintiff recover, he shall have costs, without reference to amount of judgment. *Laws of 1860, 645, ch. 379.*
4. Comptroller may administer oaths. *Ib.*, § 3.
5. All process and papers for commencement of actions and proceedings against the city shall be served either on the mayor, comptroller, or counsel to the Corporation. *Ib.*, § 4.
6. No executions (in proceedings hereafter commenced) can be levied on property of the Corporation, until after ten days' written notice of its issue, given to the comptroller by the party, his agent, attorney, or the sheriff. *Ib.*, § 5. (Took effect, April 14, 1860.)
7. Section 5 of Laws of 1859, 1127, authorizing the comptroller to take means to reverse judgments against the city, is constitutional. *N. Y. Com. Pl., Sp. T.*, 1860, *Outwater v. Mayor, &c.*, of New York, 18 *How. Pr.*, 572.
8. An affidavit of the comptroller, that he has reason to believe that certain judgments were obtained by collusion and fraud, is not of itself sufficient to entitle him to have the judgments opened or reversed. His belief, in that respect, shown to the court, is sufficient to entitle him, in the language of the act, to "take all proper and necessary means to have them opened or reversed," but it rests in the sound

NEW YORK COMMON PLEAS.

discretion of the court whether the application will be granted or not. *Ib.*

9. The clause of the act of 1857 (*Laws of 1857*, ch. 446, § 38), relating to work necessary to be done to complete or perfect a particular job, &c., for the Corporation of the city of New York, does not include work forming a part of a job, which, in a contract for the residue of the job, appears to have been intentionally excluded, to be let in future, or to be otherwise done. *People v. Mayor, &c., of New York, Ante*, 144.

NEW YORK COMMON PLEAS.

1. The New York Common Pleas has jurisdiction of actions for partition. *Althouse v. Radde*, 3 *Bosw.*, 410.
2. Where the determination of the New York Common Pleas is in conflict with a decision of the Supreme Court, it is a proper case for allowing an appeal to the Court of Appeals. 1858, *Clapp v. Graves*, 2 *Hill.*, 243.

NONSUIT.

It is the duty of a judge on trial to order a nonsuit, whenever the evidence is of such a character as to make it clear that a verdict for the plaintiff would be set aside at the general term. [1 *Wend.*, 376; 6 *Ib.*, 436; 3 *Hill*, 287.] 1859, *Sheldon v. Hudson River Railroad Co.*, 29 *Barb.*, 226.

NOTARY PUBLIC.

1. Under *Laws of 1859*, ch. 360,—providing that, in addition to their present powers, notaries public of this State are hereby authorized to administer oaths and affirmations, and to take the proof and acknowledgments of deeds, mortgages, and any other papers for use or record in this State, in all the cases where the same may now be taken and administered by commissioners of deeds, and under the same rules, regulations, and requirements prescribed to commissioners of deeds, and such notaries' acts may be performed without official seal,—notaries may within their respective counties take acknowledgment and proof of deeds, &c., though the county be one in which there are no commissioners of deeds. *Supreme Ct., Sp. T.*, 1859, *People on rel. Lent v. Hascall*, 18 *How. Pr.*, 118.
2. The acts of notaries, in administration of oaths, affirmations, and acknowledgments, confirmed. *Laws of 1860*, 767, ch. 443.

 NUISANCE.

NUISANCE.

Though a person is liable for unnecessary injury done by him in abating a nuisance, the kind of property constituting the nuisance, and the attending circumstances, must be considered in determining if unnecessary injury has been done. *Northrop v. Burrows*, *Ante*, 365.

COMPLAINT, 27.

OFFICER.

1. The proper form of a bond of a collector of an incorporated village, and the liability of the obligors. *Village of Warren v. Philips*, 30 *Barb.*, 646.
2. In an action to recover an officer's salary, where it is not shown that he rendered any services, but his readiness to do so if he had been required is relied on, it is necessary to prove that he was duly qualified. *Halbeck v. Mayor, &c., of New York*, *Ante*, 439.
3. Of the liability of the town collector and his sureties upon his official bond. *Looney v. Hughes*, 30 *Barb.*, 605.
4. Of the liability of a town collector for enforcing a tax wrongly assessed. *Johnson v. Learn*, 30 *Barb.*, 616.

OYER AND TERMINER.

1. The courts of Oyer and Terminer are continuous and permanent courts in each county of the State. 1859, *Quimbo Appo v. People*, 20 *N. Y. (6 Smith)*, 531, 546.
2. They have not power to order a new trial upon the merits after a conviction for felony. [2 *Barb.*, 282; 8 *Wend.*, 549; overruling *People v. Morrison*, 1 *Park. Cr.*, 625; *People v. Stone*, 5 *Wend.*, 39; *People v. Hartung*, 17 *How. Pr.*, 86.] *Ib.*

PARLIAMENTARY LAW.

1. The House of Representatives has a power to institute inquiries and to order the attendance of witnesses; and, in case of disobedience, to bring them in custody to the bar, for the purpose of examination. *Wickelhausen v. Willett*, *Ante*, 164.
2. If there be a charge of contempt and breach of privilege of the House, and an order for the person charged to attend and answer it and a wilful disobedience of that order, the House has power to cause the person charged to be taken into custody, and brought to the bar to answer the charge. *Ib.*

PARTIES.

3. Where the House has jurisdiction of the subject-matter, its determination as to the exercise of these powers cannot be questioned collaterally. *Ib.*
4. Where by the statement of facts agreed on by the parties, it is alleged that the House, in due form of law, required and caused to issue in due and proper form of law a warrant for the arrest, the court will not regard the objection that it is not stated that an order for the appearance of the party was first issued and disobeyed. *Ib.*

PARTIES.

1. One who has possession of and legal title to any thing in action—*e. g.*, a promissory note—is the real party in interest, within section 111 of the Code, though he may have purchased it on agreement to pay for it after its collection. 1858, *Cummings v. Morris*, 3 *Bosw.*, 560.
2. An action on a constable's bond against the sureties is properly brought in the name of the mayor, aldermen, and commonalty of the city of New York. [5 *Seld.*, 176.] 1859, *Mayor, &c., of New York v. Brett*, 2 *Hilt.*, 560.
3. The creditors of a firm having secret partners have the *right*, but are not *compelled*, to join such partners as defendants in an action against the firm. [1 *B. & Adol.*, 398.] 1859, *Brown v. Birdsall*, 29 *Barb.*, 549.
4. In an action against joint debtors, some of whom are non-residents, the non-residents need not be joined, unless they have property in this State. *Ib.*
5. *It seems*, that where joint debtors reside in different States, they may be sued separately in the respective States having jurisdiction of their respective persons or property, and that a judgment in such case against one in one State is no bar to a recovery against the others in another State. *Ib.*
6. A person injured by a collision resulting from the concurrent (though not joint) negligence of two railroad corporations, may maintain an action against both jointly. 1859, *Colegrove v. New York & New Haven, and New York & Harlem Railroad Companies*, 20 *N. Y.* (6 *Smith*), 492.
7. Both husband and wife are necessary parties to an action for a tort of the wife not committed in the presence of the husband. [2 *Kent's Com.*, 149.] 1860, *Marsh v. Potter*, 30 *Barb.*, 506.
8. A husband and wife cannot maintain an action in their joint names, to recover for the conversion of the separate property of the wife. The wife must sue alone. [Van Santv.'s Pl., 99–105; reviewing *Van Buren*

PARTIES.

- a. Cockburn*, 2 Code, 62; *Ingraham a. Baldwin*, 12 Barb., 10; *Willis a. Underhill*, 6 How. Pr., 396; *Rusher a. Morris*, 9 Ib., 266; *Howland a. Fort Edward Paper Mill Co.*, 8 Ib., 505, 512; *Brownson a. Gifford*, 8 Ib., 389; *Smith a. Kearney*, 9 Ib., 466.] *Gen. T., VI. Dist.*, 1859, *Ackley a. Tarbox*, 29 Barb., 512.
9. Married women may sue and be sued. *Laws of 1860*, 157, ch. 90.
10. *It seems*, that where a bond has been assigned as collateral security for a debt,—the assignment to be void when the debt is paid,—the assignor is a necessary party to an action brought by the assignee upon the bond. [Code, §§ 117, 118, 122.] 1859, *Western Bank a. Sherwood*, 29 Barb., 383, 387.
11. In an action against a corporation, judgment in which would be presumptive evidence against the stockholders in actions against them on their individual liability, the stockholders are interested to assist the defence; and if the attorneys of the corporation decline further defending on the ground of non-payment of their fees, the corporation having become insolvent, the stockholders may intervene, and at their instance the court will, in a proper case, relieve the corporation from a default, and allow them to carry on the litigation. 1858, *Peck a. New York and Liverpool United States Mail Steamship Co.*, 3 Bosw., 622.
12. In an action for lands, under the Code, there cannot properly be several plaintiffs claiming under distinct titles for distinct interests. *People and Taylor a. Mayor, &c.*, of New York, *Ante*, 111.
13. The People of the State and certain individuals who were their lessees of real property, united in bringing an action for the possession thereof. The complaint alleged that the lands were owned in fee by the People, who, unless a lease thereafter described was valid, were entitled to the possession; that the Corporation of the city of New York had taken possession of the premises, and rented the same to the other defendants, who, unless the lease thereafter described was valid, wrongfully withheld possession from the People; that subsequent to such taking possession, the People gave to the individual plaintiffs a lease of the lands, who, under the lease, if it was valid, became entitled to the possession, but the defendants wrongfully withheld it; that the defendants in possession refused to pay rents to the plaintiffs, being directed to refuse by the Corporation, and that they paid their rents to the agent of the Corporation.
- Held*, that the People were not entitled to judgment, either for possession or for rents and profits. By the averments of the complaint they appeared to have no interest in the action, and were not proper parties thereto. *Ib.*

PARTIES.

14. A piece of land was conveyed to several persons by name, as "trustees of the H. Baptist Society." A house of worship was erected thereon by the society, but it was not incorporated. An action was brought by persons claiming as trustees of the society, and as successors to those who were named in the grant, to recover possession of the land.

Held, that the plaintiffs could not maintain the action. Only the original grantees, or the society itself, when incorporated, had any rights in the premises. [8 Johns., 385 ; 9 Ib., 73.] 1859, *Bundy a. Birdsall*, 29 *Barb.*, 31.

15. One who deposits the money of others, together with his own, upon an illegal wager, can only recover his own money back. He cannot sue as trustee for the others. 1859, *Ruckman a. Pitcher*, 20 *N. Y.* (6 *Smith*), 9.

16. In an action for trespass on land, the tenants in common may be joined as plaintiffs. [14 Johns., 426 ; 15 Ib., 479.] 1858, *Van Deusen a. Young*, 29 *Barb.*, 9.

17. The Code has not altered the rule that tenants in common—*e. g.*, heirs of a party seized of a reversion of land upon lease—may either join in an action for rent, or bring separate actions. Section 117 of the Code does no more than *sanction* a joint action. Section 119 refers to cases where a separate judgment would not be proper. 1858, *Jones a. Felch*, 3 *Bosw.*, 63.

18. In an action brought by the People to restrain a municipal corporation from proceeding under a public contract required by law to be awarded to the lowest bidder, on the ground that the contractors were not the lowest bidders, the contractors and the bidders need not be made parties. *People a. Mayor, &c., of New York*, *Ante*, 144.

19. In foreclosing a purchase-money mortgage, the wife of the mortgagor is a necessary party. *Mills a. Van Voorhies*, *Ante*, 152.

20. The wife of the grantee of an equity of redemption in lands subject to a mortgage, is a necessary party to an action against the grantee for foreclosure of the mortgage. *Ib.*

21. The omission to make such wives parties to the foreclosure, constitutes a defect in the title which discharges a purchaser from specific performance. Such a defect is not a proper subject for compensation. *Ib.*

22. In an action to set aside an award, it never was proper to join the arbitrators as defendants, unless they were charged with fraud or gross misconduct, and a discovery sought from them. [Story's Eq. Jur., §§ 1498, 1500 ; Story's Eq. Pl., § 232 ; 8 How. (U. S.), 134.] *Knowlton a. Mickles*, 29 *Barb.*, 465.

PARTIES.

23. Whether, under the Code, the arbitrators can in any case be *necessary* parties,—*Query?* *Ib.*
24. The receiver of a judgment-debtor brought an action against a grantee of the latter, to set aside his conveyance as fraudulent, without making the debtor a party. The defendant did not raise the objection by demurrer or answer, nor upon the trial.
Held, on appeal, that the debtor was an indispensable party, whose absence could not be waived by the defendant. It was the duty of the court to cause him to be brought in. Judgment for plaintiff reversed, with leave to amend by adding the debtor as a party. [Code, § 122; 4 Paige, 75; 7 Barb., 221; 1 Peters, 138, 139; 2 Duer, 663; 3 *Ib.*, 121.] 1859, *Strover a. Brainard*, 29 *Barb.*, 25.
25. In an action to set aside a conveyance made by an assignee for the benefit of creditors, brought on the ground that the assignment was void, the assignee is not a necessary party. 1859, *Jessup a. Hulse*, 29 *Barb.*, 539.
26. Trustees for the benefit of creditors executed a reassignment, which was void by statute [1 Rev. Stat., 730]; and, thereafter, the party in possession under such reassignment executed a mortgage to one having constructive, but not actual notice of the defect.
Held, that in an action by *cestuis que trust* to enforce the trust, the mortgagee, though a proper, was not a necessary party. 1859, *Briggs a. Davis*, 20 *N. Y. (6 Smith)*, 15, 25.
27. Neither the railway company which executed a mortgage, nor the depositary who holds the fund to the credit of the trustee, nor the sheriff who has served an attachment on the fund in a suit against the railway company, are necessary parties to an action brought by the trustee for the purpose of obtaining instructions as to the application of the fund to the bondholder's claims. *Coe a. Beckwith*, *Ante*, 296.
28. The fact that certain parties in interest are numerous and unknown, is a sufficient excuse for not joining them as defendants. *Ib.*
29. On the death of plaintiff, if the cause of action survive, the sole acting executor may be allowed to continue it without joining executors who have not qualified. [Laws of 1838, 103.] *N. Y. Com. Pl., Sp. T.*, 1858, *Moore a. Willett*, 2 *Hill.*, 522.
30. Where, in an action to set aside an assignment for benefit of creditors, the assignee is made a party, his objection that the creditor does not sue on behalf of others as well as of himself, is not a mere objection for defect of parties, and it may be taken for the first time at the trial. *Green a. Breck*, *Ante*, 42.
31. Leave to sue *in forma pauperis*, may be granted in an action by a married woman respecting her separate property, and for injuries to her

PARTITION.

person. *Supreme Ct., Sp. T.*, 1860, *Roberti a. Carlton*, 18 *How. Pr.*, 466.

COMPLAINT, 18.

PARTITION.

Where a guardian *ad litem* for infant defendants in partition is properly before the court, a judgment by default without his interposing a merely formal answer, is valid; and if otherwise, the defect is caused by obtaining leave and putting in an answer pursuant to such leave, admitting the allegations of the complaint, 1858, *Althause a. Radde*, 3 *Bosw.*, 410.

PILOT.

The pilot of a steam-tug or steam tow-boat, who being upon his own boat tows a vessel through Hell Gate, and by signals made to the helmsman of the vessel in tow, directs changes at the helm, to conform to the movements of the steamer, does not pilot such vessel within the prohibition of the act of 1847 (*Laws of 1847*, ch. 69), relative to Hell Gate pilots. *People a. Francisco*, *Ante*, 30; but see *Laws of 1860*, 76.

PLEADING.

1. The delivery of a specialty, though essential to its validity, need not be stated in pleading. [1 *Chitt. Pl.*, 348; 1 *Saund.*, 291; 10 *How. Pr.*, 274; 12 *Ib.*, 452; 15 *N. Y.*, 425.] 1859, *La Fayette Insurance Co. a. Rogers*, 30 *Barb.*, 491.
2. An averment that one party made a statement of an account, and delivered it to the other, who made no objection to it, is not an averment that an account was stated between them. 1859, *Emery a. Pease*, 20 *N. Y.* (6 *Smith*), 62. See *Lockwood a. Thorn*, 18 *Ib.*, 285.
3. In pleading usury, it is not necessary to allege in terms that the transaction was "usurious" or "corrupt," if the facts which amount to usury are stated with sufficient certainty to enable the opposite party to know what he has to meet. 1859, *Miller a. Schuyler*, 20 *N. Y.* (6 *Smith*), 522.
4. A complaint alleged that the plaintiff and defendant were jointly interested in two contracts with a railroad company, on which the company owed them \$12,000, for his share of which the plaintiff prayed an accounting and judgment. The answer denied that the plaintiff had any interest in one of these contracts, but was silent as to the indebtedness.

PROHIBITION.

Held, that it was not thereby admitted that the \$12,000 was due on the other contract in which the plaintiff had an interest. 1859, *Williams v. Hayes*, 20 *N. Y. (6 Smith)*, 58.

5. *It seems*, that when a party wishes to avail himself of an implied admission in the pleadings, he must call the attention of the court or referee to it. *Ib.*
6. If place is material to be alleged, and the pleading is ambiguous as to the place, the presumption is against the pleader. *Beach v. Bay State Co.*, *Ante*, 71.
7. Certain insufficiencies in a complaint on an official bond,—*Held*, not available on demurrer, but only by motion. *Village of Warren v. Philips*, 20 *Barb.*, 645.
8. If an objection which ought to be taken by demurrer—*e. g.*, that a defect of parties appears on the face of the complaint—is taken only by an allegation in an answer, it will be deemed to have been waived; and the allegation may be struck out of the answer on motion. *Gussett v. Crocker*, *Ante*, 133.
9. It is not within the office of a demurrer to state objections not apparent upon the face of the complaint,—*e. g.*, to name parties who should have been joined;—and no conclusion is to be drawn from such statements, adverse to the plaintiff. *Coe v. Beckwith*, *Ante*, 296.
10. A party should not have leave to put in a verified pleading containing allegations in alternative which are inconsistent. *Salters v. Genin*, *Ante*, 478.

AMENDMENT; ANSWER; COMPLAINT; COUNTER-CLAIM; DEMURRER; ESTOPPEL, 2; INDICTMENT; JUSTICES' COURTS, *tit. Pleading*; REPLY; VERIFICATION.

PROHIBITION.

The writ of prohibition is a proper remedy, not merely where the inferior court entertains a proceeding in which it has no jurisdiction, but also where, having jurisdiction of the cause, it assumes to exercise any unauthorized power therein. [*Jac. Law Dic., tit. Prohibition*; *Darby v. Cosens*, 1 *T. R.*, 552; 3 *T. R.*, 3; *F. N. B., tit. Prohibition.*] 1859, *Quimbo Appo v. People*, 20 *N. Y. (6 Smith)*, 531.

QUESTIONS OF LAW AND FACT.

1. Negligence is a question of fact. 1859, *Harris v. Northern Indiana Railroad Co.*, 20 *N. Y. (6 Smith)*, 232, 238.
2. Whether certain language amounts to a refusal, is a question of fact for the jury. *Ib.*

QUO WARRANTO.

3. *It seems*, that it is for the jury to decide whether a party was guilty of *gross*, or of *ordinary* negligence; and whether an act was done in a "reasonable time." *Bissell v. New York Central Railroad Co.*, 29 *Barb.*, 602, 610.
4. In an action against a common carrier, the question whether the defendant exercised reasonable diligence in the fulfilment of his contract is, upon some evidence appearing to the contrary, a question of fact for the jury. 1859, *Williams v. Vanderbilt*, 29 *Barb.*, 491, 504.
5. Where there are no disputed facts as to the effect of a regulation on a railroad, its reasonableness is generally a question of law for the court. 1859, *Vedder v. Fellows*, 20 *N. Y.* (6 *Smith*), 126.
6. Whether unnecessary violence was or was not used in carrying out such a regulation, is a question of fact for the jury. *Ib.*
7. What is a reasonable time, for a consignee to take away goods after notice of their arrival, is a question of fact for the jury. [3 *Comst.*, 322; 5 *Gray*, 432.] 1859, *Cary v. Cleveland and Toledo Railroad Co.*, 29 *Barb.*, 35, 49.

QUO WARRANTO.

That an action in the nature of *quo warranto*, under the Code, is in substance the same, and governed by the same rules as under the former practice. *People v. Pease*, 30 *Barb.*, 588.

RAILROAD CORPORATIONS.

1. The powers and duties of trustees under railway mortgages. *Coe v. Beckwith*, *Ante*, 296.
2. A foreign railroad corporation running its trains over the road of a railroad corporation of this State, is not liable for an injury to cattle caused by its train, but to which the negligence of the owner contributed, though the road has not been fenced as required by the act of 1850. *Schanchan v. New York and New Haven Railroad Co.*, *Ante*, 398; *contra, Ib.*, note.

RECEIVER.

1. A receiver cannot be appointed in an action to recover possession of real property, unless some equitable grounds are made to appear, entitling the plaintiff to the rents and profits *as such*, or unless their sequestration is necessary to his protection. *People and Taylor v. Mayor, &c., of New York*, *Ante*, 111.

RECOGNIZANCES.

2. Section 1 of the act of 1852, respecting powers and duties of receivers of corporations, amended. *Laws of 1860*, 699, ch. 403.
3. The fact that a receiver in supplementary proceedings, duly appointed, and to whom the debtor has assigned his property, leaves property in possession of the debtor, does not, without actual fraud or collusion, affect the preference gained by the creditor at whose instance the receiver was appointed; and subsequent judgment-creditors cannot levy on such property. 1858, *Fessenden v. Woods*, 3 *Bosw.*, 550.
4. A receiver of the property of a judgment-debtor may maintain an action against the debtor himself for a conversion of property the title to which had vested in the receiver. [5 *Seld.*, 142.] 1858, *Gardner v. Smith*, 29 *Barb.*, 68.
5. He cannot compel the debtor to surrender a mere possession, which he holds only upon sufferance. *Ib.*
6. A receiver appointed in another State may sue as such in this State. [6 *Cow.*, 46; see 1 *Seld.*, 341.] 1859, *Runk v. St. John*, 29 *Barb.*, 585.

SUPPLEMENTARY PROCEEDINGS.

RECOGNIZANCES.

1. In criminal cases, if defendant, on being called at any stage of the trial, fails to appear *in person*, the court may forfeit the recognizance. [2 *Benn. & H. Cr. Cas.*, 454.] *Sp. T.*, 1858, *People v. Petry*, 2 *Hilt.*, 523.
2. Upon application to vacate a judgment entered upon a recognizance and remit the forfeiture, the court will not look into the proceedings to inquire as to the excuse of the prisoner for the breach, until he appears and submits himself to trial and judgment on the indictment. Such application should not receive favor, unless it is shown that the bail did not connive at the escape and have made every reasonable effort to surrender the defendant. *Ib.*

REDEMPTION.

The amount to be paid by a junior mortgagee on redeeming the premises from foreclosure sale. *Gage v. Brewster*, 30 *Barb.*, 387.

REFERENCE.

1. Though the issues in the action are such that it may prove that the examination of a long account will be important collaterally, this does not render the action referable without the consent of the parties. The issues must be such as to involve directly such examination. *Cameron v. Freeman*, *Ante*, 333.

REFERENCE.

2. An action to recover compensation for indorsing, for defendant's accommodation, a large number of his notes, is properly referable, as requiring the examination of a long account, if the case involves no difficult questions of law. *Masterton v. Howell*, *Ante*, 118.
3. On application to reform a deed where it appears that it was made between trustees in relation to the trust property, and that the rights of infants were concerned, the court ordered a reference. *Saltus v. Pruyn*, 18 *How. Pr.*, 512.
4. The power of a referee to allow amendments is restricted to amendments to cure immaterial variances. *Union Bank v. Mott*, *Ante*, 372.
5. A referee cannot allow a cause of action to be inserted in the complaint by way of amendment. *Ib.*
6. Section 272 of the Code amended to read as follows:

"The trial by referees shall be conducted in the same manner and on similar notice as a trial by the court. They shall have the same power to grant adjournments and to allow amendments to any pleadings, and to the summons, as the court upon such trial, upon the same terms and with the like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them, by attachment, and to punish them as for a contempt for non-attendance or refusal to be sworn or testify, as is possessed by the court. They must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed in like manner, and with like effect in all respects, as in cases of appeal under section 268; and they may in like manner settle a case or exceptions. The report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict.

"When the case on appeal shall have been heard and decided at the the general term, upon the report of the referee and exceptions, without a case containing the evidence, the decision may be reviewed in like manner on appeal to the Court of Appeals. If the judgment be reversed at the general term and a new trial ordered, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and in that case the question whether the judgment should have been reversed either upon questions of fact or of law, shall be open to review in the Court of Appeals." *Laws of 1860*, 786, ch. 459, § 10.

7. Where a referee finds for the plaintiff a sum less than \$50, it is proper for him to find also whether the plaintiff is entitled to costs, on the

RELIGIOUS CORPORATION.

ground that the action could not have been maintained in a justice's court; and judgment may be entered on his report as on the decision of a judge. *Supreme Ct.*, 1859, *Gilliland v. Campbell*, 18 *How. Pr.*, 177.

8. A finding in the report of a referee, that the defendants, a corporation, "duly accepted" a bill, is to be construed as importing that their officer who signed the acceptance had authority so to do. *Farmers and Mechanics' Bank v. The Empire Stone-Dressing Company*, *Ante*, 47.
9. After the parties had settled the cause, plaintiff's attorney took a default and entered judgment for his costs, and on a motion made by the defendant to vacate and set aside the judgment, on which the sole question in dispute was whether the action was settled on the terms of each party paying his own costs, the court directed a reference to ascertain in what manner the action was settled. The order of reference directed the referee to take proof as to the terms and conditions of the settlement of the action, and to report the same, together with the testimony, to the court. The referee reported that the action was settled on condition that each party should pay his own costs, and subjoined to his report the testimony taken before him.

Held, That the order of reference was rightly construed by the referee. He was not confined by it to taking and submitting the testimony. *N. Y. Superior Ct.*, 1859, *Goodridge v. New*, 18 *How. Pr.*, 189.

10. A referee who unreasonably delayed the proceeding was removed, and another appointed by the court. *Forrest v. Forrest*, 3 *Bosw.*, 650.
11. Adjournments not to be granted on account of absence of counsel on a pleasure voyage. *Ib.*

RELIGIOUS CORPORATION.

1. On an election of trustees in a religious corporation, the judges of election can pass upon the qualifications of a voter only before his vote is received. They have no power to disregard votes which they have once received. *Hartt v. Harvey*, *Ante*, 321.
2. The certificate of the judges set forth that one set of candidates had a majority of the votes cast, but that after the result had been declared, satisfactory evidence was produced to the judges that a part of the votes for such candidates were illegal, and that, setting these aside, the other set of candidates were elected, which the certificate, therefore, declared to be the result of the election.

REPLY.

Held, that the certificate destroyed itself, and that the former set of candidates were to be deemed elected. *Ib.*

INJUNCTION, 3.

REPLY.

1. Section 153 of the Code—relating to the reply—amended by adding at the end: And in other cases, when an answer contains new matter, constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and in that case, the reply shall be subject to the same rules as a reply to a counter-claim. *Laws of 1860, 785, ch. 459, § 5.*
2. A new assignment in pleading under the Code is not allowable. The remedy, if the complaint is insufficient, is by amendment. 1858, *Stewart v. Wallis*, 30 *Barb.*, 344.

SATISFACTION OF A PART OF PLAINTIFF'S CLAIM.

Satisfaction of a part of plaintiff's claim may be ordered where the answer admits a specific sum to be due. [3 *E. D. Smith*, 614; 26 *Barb.*, 200; 16 *How. Pr.*, 193.] *N. Y. Superior Ct., Sp. T.*, 1860, *Guier v. Murphy*, 18 *How. Pr.*, 411.

SERVICE AND PROOF OF.

1. An affidavit to obtain an order for service by publication, under subdivision 5 of section 135 of the Code, must state the residence of the defendant, or that it neither is known to plaintiff, nor can with reasonable diligence be ascertained by him. The order must direct the copy summons, &c., to be *forthwith* deposited in the post-office. *Supreme Ct., Chambers*, 1859, *Hyatt v. Wagenright*, 18 *How. Pr.*, 248.
2. Section 135 of the Code—regulating service of summons by publication—amended by adding at the end: In actions for the foreclosure of mortgages on real estate already instituted or hereafter to be instituted, if any party or parties, having any interest in or lien upon such mortgaged premises, are unknown to the plaintiff, and the residence of such party or parties cannot, with reasonable diligence, be ascertained by him, and such fact shall be made to appear, by affidavit, to the court, or to a justice thereof, or to the county judge of the county where the trial is to be had, such court, justice, or county judge, may grant an order that the summons be served on such unknown party or parties by publishing the same for six weeks, once in each week, successively, in the State paper, and in a newspaper printed in the county where

SET-OFF.

the premises are situated, which publication shall be equivalent to a personal service on such unknown party or parties. *Laws of 1860, 784, ch. 459, § 4.*

3. Where service by mail may be made, an order extending time to answer, obtained and mailed on the last day of the time to answer, is sufficient to prevent the plaintiff from regularly entering judgment as upon failure to answer. *Schuhardt v. Roth, Ante, 203.*

SET-OFF.

1. Any matter may be set off in an action brought by an assignee for the benefit of creditors, which might have been set off had the action been brought by the assignor. The assignee is not a *bona-fide* purchaser. [Disapproving of 2 Duer, 78.] 1859, *Maas v. Goodman*, 2 *Hill*, 275.
2. As to what demands constitute a set-off within 2 Revised Statutes, 354, § 32 [18]. *Cummings v. Morris*, 3 *Bosw.*, 560.

SHERIFF.

1. A sheriff sued upon his liability as bail under section 201 of the Code, cannot avoid his liability by showing that the debtor, whom he arrested and discharged without sufficient bail to the action, was insolvent and had no property not exempt from execution, and had ever since remained in the same condition. *Metcalf v. Stryker, Ante, 12.*
2. A sheriff is entitled to the same expenses and commissions upon things in action taken on attachment under the Code, and collected by him, as trustees of insolvent debtors in attachment, &c., under 2 Revised Statutes, 46, § 29. *Mayhew v. Wilson, Ante, 289.*
3. He must specify the items of expenses under oath, of himself or of the deputy who paid them. *Ib.*
4. A sheriff who, on going out of office, neglects to deliver over to his successor a defendant whom he holds in custody under execution against the person, is liable for such neglect to the plaintiff in the execution. *French v. Willet, Ante, 99.*

ACTION, 2; BAIL; ESCAPE.

SHIPS AND VESSELS.

1. A shipbuilder contracted to build and deliver a vessel complete. He did so, and was paid in full; when, after the delivery, a material-man claimed a lien upon the vessel for materials furnished to the builder.

Held, 1. That the builder was, until the actual delivery of the vessel, the *owner*, within the meaning of 2 Revised Statutes, 493. [1 *Kern.*, 35.]

SLANDER.

2. That he could have no lien upon the vessel.
3. That the material-man had a valid lien for materials furnished to the builder for the construction of the vessel. [Distinguishing Hubbell *a. Dennison*, 20 Wend., 181; Smith *a. Steamer Eastern Railroad*, 1 Curtis, 253.] 1859, Low *a. Austin*, 20 N. Y. (6 Smith), 181; and see M'Conihe *a. New York and Erie Railroad Co.*, *Ib.*, 495.
2. The provisions of the Revised Statutes, entitled "Of proceedings for the collection of demands against ships and vessels," largely amended. *Laws of 1860*, 347, 900.

SLANDER.

To say of a man, after a libel has been published, that he is the author of it, is actionable *per se*. Viele *a. Gray*, *Ante*, 1.

SPECIAL SESSIONS.

The Court of Special Sessions have no jurisdiction of a prisoner who, on his committal, entered into recognizance to appear at the General Sessions. People *on rel. Doyle a. Johnston*, *Ante*, 294.

COURTS OF SESSIONS.

SPECIFIC PERFORMANCE.

In an action for the *specific performance* of a contract, for the exclusive manufacture and sale to the plaintiffs of a particular article, it appeared that the agreement or contract between the parties was not fair and equal; that it would be impossible for the court to ascertain whether the most essential provisions of the contract on both sides had been complied with; and that the parties themselves had provided the actual measure of damages to be paid by the defendant in case of a violation of the terms of the contract.

Held, that the case was not a proper one for an injunction. In such a case, the remedy is by an action for damages. *Supreme Ct., Sp. T.*, 1860, Barnes *a. Park*, 18 *How. Pr.*, 534.

STATUTE OF FRAUDS.

1. One who signs a note as if he were a principal maker, is liable upon it, although in fact he was a mere surety, and the note expresses no consideration. Casey *a. Brabason*, *Ante*, 368.
2. As respects one who signs *as principal*, the note is not a special promise to answer for the debt of another, within the statute of frauds. *Ib.*

STATUTES.

3. An agreement by one who has the refusal of property, to attempt to procure a sale to a third party, is not within the statute of frauds. *Hosford v. Carter*, *Ante*, 452.
4. Section 7 of the provisions of 2 Revised Statutes, 134, respecting fraudulent conveyances of lands, amended. *Laws of 1860*, 547, ch. 322.

STATUTES.

The Board of Supervisors cannot designate by resolution the papers to publish the laws; it must be done by ballot, and if there is a tie vote there can be no choice. *Supreme Ct., Sp. T.*, 1860, *People on rel. Fuller v. Supervisors of Seneca*, 18 *How. Pr.*, 461.

STATUTORY CONSTRUCTION.

1. The statute of limitations is to be liberally construed, so as to carry out the general intention of the Legislature. [30 Eng. L. & E., 600; 3 Exch., 706; 3 Johns., 263; 24 Eng. L. & E., 239; 3 Wils., 145; 1 Den., 151; 4 Bing., 686; 2 Seld., 124.] 1859, *Olcott v. Tioga Railroad Co.*, 20 *N. Y.* (6 *Smith*), 210, 223.
2. Ordinarily, it is not necessary, in order to bring a subject within the purview of a statute, that every particular of the statutory language should apply to it, provided the intent to embrace it is clear. [6 *N. Y.*, 567.] *Ib.*
3. An act (*Laws of 1857*, vol. 1, p. 840, as amended April 14, 1857), imposes a penalty of \$20 for certain violations thereof, "one-half to the complainant, and the other half to the county treasurer," and "in case the complainant fails to sustain his action, he is to be liable for the costs thereof." There are no other words indicating who is to sue.
Held, that a common informer could not sue for the penalty. 1859, *Seward v. Beach*, 29 *Barb.*, 239.
4. Penal statutes are strictly construed. *Ib.*

STAY OF PROCEEDINGS.

1. Defendant obtained an *ex-parte* order staying proceedings, which plaintiff did not treat as void, but moved to set aside; and the court denied the motion, and directed that the order should stand.
Held, that this rendered the stay valid. *Clumpha v. Whiting*, *Ante*, 448.
2. The appellant not having in fact given security within the rule re-

STIPULATION.²

quiring it in order to stay proceedings on appeal, applied to the court for an order staying proceedings, and the court misapprehending the effect of what he had done, deemed that he had given security within that rule, and denied the motion solely on the ground that it was unnecessary.

Held, on motion after judgment, that judgment should be opened and proceedings stayed till the determination of the appeal. *Supreme Ct., Sp. T.*, 1859, *Smith v. Heermance*, 18 *How. Pr.*, 261.

3. The court refused to stay proceedings on the ground of the pendency of another action subsequently brought in another court upon the same subject-matter, the causes of action being, however, distinguishable. *Sorley v. Brewer*, 18 *How. Pr.*, 509.

STIPULATION.

In an action pending in the third district, an order to change the place of trial to the first district, was made and entered in the *first* district, upon stipulation of the attorneys.

Held, 1. That this was effectual to change the place of trial.

2. That a motion to set aside a judgment subsequently entered in the third district, must be made in the first district. *Supreme Ct., Sp. T.*, 1859, *Fitch v. Hall* 18 *How. Pr.*, 314.

SUBROGATION.

If the indorser who is sued with the maker, procures the suit to be discontinued as against himself upon his giving notes for the debt, he is not, in the absence of agreement to that effect, entitled to an assignment of a judgment which plaintiffs may have obtained against the maker, until after payment of his notes. 1858, *Payton v. Wight*, 2 *Hill.*, 77.

SUMMONS.

A summons served without the complaint, and not stating that the complaint was or when it would be filed, is irregular. *Sp. T.*, 1860, *Pignolet v. Daveau*, 2 *Hill.*, 584.

SUPPLEMENTARY PROCEEDINGS.

1. Supplementary proceedings cannot be maintained on a judgment recovered in a justice's court for less than \$25, exclusive of costs. [Disapproving 17 *How. Pr.*, 434.] *Chambers*, 1860, *Vulte v. Whitehead*, 2 *Hill.*, 596.

SUPPLEMENTARY PROCEEDINGS.

2. The court will not by supplementary proceedings enforce the judgment of a justice's court against a married woman. A justice has no jurisdiction of such actions. 1859, *Williams v. Carroll*, 2 *Hill*, 438.
3. When after an examination in supplementary proceedings, the creditor seeks a further or second examination, his omission to specify the first proceedings in the affidavit on which the second order is obtained, may be cured by amendment in a proper case. *Chambers*, 1859, *Goodall v. Demarest*, 2 *Hill*, 534.
4. A second order may be granted, allowing an examination limited to the time when the first one was concluded. *Ib.*
5. A second order may be granted *ex parte*. *Ib.*
6. Where an assignee seeks to examine a judgment-debtor, he should show in his affidavit that he has a right to proceed upon the judgment. [1 Code R., N. S., 25, 232.] *Supreme Ct., Sp. T.*, 1859, *Fredrick v. Decker*, 18 *How. Pr.*, 96.
7. Supplementary proceedings cannot be maintained upon an affidavit which does not truly describe the judgment. *Kennedy v. Weed and Wife*, *Ante*, 62.
8. The plaintiff having recovered judgment against Ira Weed and Mary Weed, docketed a transcript in which the defendants were stated to be Ira Weed and Mrs. Weed.
Held, that the supplementary proceedings founded upon such docketed judgment must be dismissed. *Ib.*
9. Such an objection goes to the jurisdiction of the judge granting the order, and cannot be cured by amendment, nor waived by the party; but is available at any time in the proceedings. *Ib.*
10. An execution may be returned at any time after it is issued, and supplementary proceedings may be taken immediately thereon; and it is immaterial that the return was made before the expiration of sixty days, at the creditor's request. The court will not go behind the return, except on a direct motion to set it aside. *Sperling v. Levy*, *Ante*, 426.
11. In proceedings for the examination of third parties under section 294 of the Code, it is not necessary that execution should be first returned before the order can be made. *Seeley v. Garrison*, *Ante*, 460.
12. Whether the judgment-debtor should have notice of such proceedings, is in the discretion of the judge. *Ib.*
13. It is competent for the judge in making such order to enjoin the person to whom it is directed from disposing of the money due till the further order of the court. *Ib.*
14. If it appear that the debtor has sold property, it is not allowable to

SUPPLEMENTARY PROCEEDINGS.

- inquire to whom, unless it appear that he still possesses some valuable interest in it; as where the sale was for an inadequate price, with an agreement allowing him to redeem. 1859, *Williams v. Carroll*, 2 *Hilt.*, 438.
15. Where a judge is asked to make an order in supplementary proceedings requiring the application of property alleged to belong to the defendant, but in the possession of and claimed by another, the testimony should show beyond reasonable doubt that the claim is unfounded, and used merely as a cover. *Hall v. McMahon*, *Ante*, 103.
16. Even if this is shown, yet, if the property is such as may be levied on, the plaintiff may properly be left to his execution. *Ib.*
17. Where the evidence merely excites a suspicion that property which might be levied on was transferred in fraud of the creditor, and without consideration, its application should not be compelled by an order. *Ib.*
18. The debtor's earnings are not exempt, although he has a family depending upon him, unless he also shows that he supports them wholly or in part by his labor. *Chambers*, 1860, *Martin v. Sheridan*, 2 *Hilt.*, 586.
19. The receiver acquires title only to property belonging to the judgment-debtor at the time supplementary proceedings were commenced. [1 *Hilt.*, 505.] 1859, *Campbell v. Genet*, 2 *Hilt.*, 290.
20. A receiver in supplementary proceedings is not trustee alone for the parties at whose instance he was appointed, but for all the creditors of the judgment-debtor. *Bostwick v. Beizei*, *Ante*, 197.
21. He is to administer the property vested in him, under the direction of the court, for the benefit of all, first discharging those debts which have acquired an equitable priority. *Ib.*
22. The receiver in supplementary proceedings brought an action to set aside an assignment for benefit of creditors made by the judgment-debtor, and obtained judgment therein.
Held, that the judgment should allow to the assignee all payments made under the assignment to others than himself prior to the commencement of the action. *Ib.*
23. Mode of reaching a trust fund of which the debtor is the beneficiary. *Genet v. Foster*, 18 *How. Pr.*, 50.
24. Effect of appointing the same person receiver in two proceedings, in a peculiar case. *Ib.*

SUPREME COURT.

SUPREME COURT.

1. The Supreme Court in the first district regard the decision of a general term in any other district as controlling, until reversed, unless clearly erroneous. *Sp. T.*, 1859, *Loring v. United States Gutta-Percha Co.*, 30 *Barb.*, 644.
2. Special terms of the Supreme Court in the fifth district to be held at times and places of holding Circuit and Oyer and Terminer, in 1861. *Laws of 1860*, 23, ch. 17.

SURROGATE.

1. That the surrogate has not power, on application made before final accounting, to direct payment of a debt out of the order of preference prescribed by the statute, unless proof is made that the debt is due. *Mahony v. Gunter*, *Ante*, 431.
2. The surrogate has not jurisdiction to settle the accounts of a guardian upon an accounting sought by the same party, by a petition in his character of administrator. *Banks v. Taylor*, *Ante*, 199.
3. Of the jurisdiction of a surrogate of this State over a foreign executor taking out letters of administration here. 1859, *Parsons v. Lyman*, 20 *N. Y.* (6 *Smith*), 103.

TAXES.

Of the requisites of the petition for enforcement of payment of personal tax under the act of 1843 (*Laws of 1843*, ch. 230, art. 2, § 12; same statute, 1 *Rev. Stat.*, 5th ed., 965, *§ 63), and the time within which such proceedings may be commenced. *Kelly's Application*, *Ante*, 208.

TENANTS IN COMMON.

Where tenants in common of a chattel unite in an action for its conversion, one of them cannot settle the action, so as to bar the other from proceeding therein. [Distinguishing *Austin v. Hall*, 13 *Johns.*, 286; *Baker v. Jewell*, 6 *Mass.*, 460; *Holland v. Wild*, 4 *Greenl.*, 255; 2 *Mass.*, 405.] 1859, *Gen. T.*, *VIII. Dist.*, *Gock v. Kerreda*, 29 *Barb.*, 120.

TIME.

Where legal notice is required to be published for ten weeks before a proceeding thereon could be had, a publication, though in each of ten successive weeks, is not sufficient if the time between the first publication and the proceeding taken is less than seventy days. *People on rel. Demarest v. Gray*, *Ante*, 468.

TRADE-MARKS.

TRADE-MARKS.

What words may be appropriated as trade-marks. Wolf *a.* Goulard, 18 *How. Pr.*, 64.

TRIAL.

I.—*Mode of.*

1. If the plaintiffs seek to recover damages, and ask equitable relief, merely incidental to the recovery of damages,—*e. g.*, the reformation of the contract sued on,—and ask such relief only in case it should be necessary as a preliminary to the recovery of damages, they cannot, after first trying the cause as an equity cause before the court without a jury, and failing to sustain their right to the equitable relief, have a subsequent trial of their right to recover, independent of such relief. New York Ice Co. *a.* Northwestern Insurance Co., *Ante*, 34.
2. The proper course in such case is to dismiss the complaint, without prejudice to a new action. *Ib.*
3. *It seems*, that where the main object of the action is a recovery of damages on a cause of action which would formerly have been a common-law action, and equitable relief is sought merely in aid of such recovery, if it should be adjudged necessary, the cause should be tried at the circuit, and not at a special term. *Ib.*
4. *It seems*, that a motion for trial by jury cannot be made after ten days after issue joined; but that the court may, of its own motion, at any time before an actual trial has been had, order a trial by jury. O'Brien *a.* Bowes, *Ante*, 106.
5. If an action properly triable before a single judge without a jury, is regularly brought to trial in that way, and a trial had, the court cannot, after all the evidence is closed and the cause submitted, order a trial of questions of fact by a jury. The judge must determine the case. *Ib.*
6. *It seems*, that a separate trial may be allowed between a plaintiff and one of several defendants, on an application to the judge at the trial, without any notice of such motion, if a notice of trial has been served. [Code, § 258.] Gurnee *a.* Hoxie, 29 *Barb.*, 547.

II.—*How brought on.*

1. One of several defendants, having a separate and peculiar defence, and appearing by a separate attorney, may bring the cause, as to him-

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self, to trial, and in case no one attends for the plaintiff, may take a judgment of dismissal by default. 1859, *Gurnee a. Hoxie*, 29 *Barb.*, 547.

2. Section 256 of the Code,—requiring ten days' notice of trial amended by adding at the end: In the first judicial district there need be but one notice of trial and one note of issue from either party, and the action shall then remain on the calendar until disposed of, and when called may be brought to trial by the party giving the notice. In the same district the courts may direct the employment of a stenographer, in such cases as appear to them to require it, and may order the expense occasioned thereby to be paid by the parties, not exceeding, however, \$5 a day to each party. *Laws of 1860*, 785, ch. 459, § 8.

III.—*Reception of Evidence.*

1. Where a witness has no difficulty in stating the words made use of by parties in a conversation, it is not proper to allow him to state what he understood to be the effect of it. 1859, *Walker a. Dunsbaugh*, 20 *N. Y.* (6 *Smith*), 170.
2. But a judgment will not be reversed on account of a breach of this rule, where it is plain that the appellant suffered no prejudice. *Ib.*
3. The judge has a discretion to determine whether a question is leading or not, and to exclude it as such, even on cross-examination; and *it seems*, that his exercise of this discretion will not be reviewed. *Ib.*
4. The admission of evidence after the testimony has been closed, is a matter of discretion, not reviewable in the Court of Appeals. 1859, *Williams a. Hayes*, 20 *N. Y.* (6 *Smith*), 58.
5. It is error to permit testimony taken on a previous trial to be read on a new trial, unless the order made on reversing the judgment on the previous trial reserved leave to do so. 1858, *Ripowain Co. a. Strong*, 2 *Hilt.*, 52.
6. The objection that secondary evidence was admitted, held obviated by subsequent proof given by the objecting party, to the same matter. *Grimm a. Hamel*, 2 *Hilt.*, 434.
7. The objection that declarations not a part of the *res gestæ* were received, is cured by the act of the objecting party in subsequently calling the same witness, and examining him as to the same matters. 1858, *Tooker a. Gormer*, 2 *Hilt.*, 71.
8. In an action for tort where punitive damages are sought, plaintiff may properly be required to give all the evidence on which he relies as to the amount of recovery, before resting the case, and a refusal to allow

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- defendant to open the cause is not erroneous. 1858, *Fry a. Bennett*, 3 *Bosw.*, 200, 232.
9. In an action brought on a note by a transferee after maturity, proof of a failure of consideration of the note should be received, though the answer alleges the facts constituting the failure of consideration as a counter-claim. 1858, *Wiltie a. Northam*, 3 *Bosw.*, 162.
10. No evidence can be admitted to prove facts not set up in the pleadings. [16 N. Y., 297.] 1859, *Pier a. Finch*, 29 *Barb.*, 170.

IV.—Charge.

1. The judge is not at liberty to state his opinion on any question on the supposition that it is a question of law, and afterwards to submit it to the jury as a question of fact. If it is a matter of fact in dispute, he has no right to state his conclusion thereon,—if it is a matter of law, he has no right to leave it to the jury. 1859, *Vedder a. Fellows*, 20 *N. Y.* (6 *Smith*), 126.
2. It is not error for the judge to intimate an opinion on a question of fact, if the determination of the question is left by him to the jury. 1859, *Althof a. Wolf*, 2 *Hilt.*, 344.
3. Where there is a direct conflict of evidence, although the evidence on one side is, if taken alone, conclusive, the question must be submitted to the jury, to decide on the veracity of the opposing witnesses. 1859, *Sackett a. Spencer*, 29 *Barb.*, 180.
4. To make it error to refuse to affirm or negative a proposition, the determination of which can have no natural influence on the verdict, it should appear that the proposition has been argued to the jury, and that justice requires that they be instructed upon it. 1858, *Bedell a. Commercial Insurance Co.*, 3 *Bosw.*, 147.
5. Where the judge omits to instruct the jury to distinguish between certain damages for which the defendant is liable, and others, arising out of the same transaction, for which he is not, the defendant should call the attention of the judge to the distinction, and request him to charge accordingly. If the counsel fail to do so, no advantage can be taken of the omission, on appeal. 1859, *Harris a. Northern Indiana Railroad Co.*, 20 *N. Y.* (6 *Smith*), 232, 239.
6. Of the proper matter of a charge in an action for libel. *Fry a. Bennett*, 3 *Bosw.*, 200, 243.
7. Charge in an action for wrongful act, &c., causing death of plaintiff's intestate. *Althof a. Wolf*, 2 *Hilt.*, 344.
8. Of the proper terms of a charge to the jury in trial of a defendant for violation of the pilot laws. *People a. Francisco*, *Ante*, 30.

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V.—*Verdict.*

1. Evidence that a third party "did business as agent" for the defendant, the kind of business not being shown; and that he was "reputed as such agent," is insufficient to sustain a finding that such person had authority to borrow money as agent of the defendant. 1859, *Perkins a. Stebbins*, 29 *Barb.*, 523.
2. Evidence tending to show that a sum was paid in notes of all denominations, issued by banks in all the States, will not authorize a jury to find that any particular part of such sum was paid in foreign notes of less than \$5 each. 1859, *Ruckman a. Pitcher*, 20 *N. Y.* (6 *Smith*), 9.
3. Where the parties agree that there can be no controversy as to what facts the evidence establishes, and embody the result of the proofs in an agreed verdict, that verdict must be taken to establish the facts according to its tenor. *N. Y. Superior Ct.*, 1858, *Sharp a. Whipple*, 3 *Bosw.*, 474.

VI.—*New Trial.*

1. The verdict of a jury will not be set aside simply because the constable in charge has sought to interfere with their deliberations, and urged them to give the verdict which they finally rendered. [2 *How. Pr.*, 23; 1 *Park. Cr.*, 256.] 1857, *Baker a. Simmons*, 29 *Barb.*, 198.
2. A verdict will not be disturbed, although the court may think the evidence not very strong or conclusive. [27 *Barb.*, 540.] 1859, *Williams a. Vanderbilt*, 29 *Barb.*, 491, 504.
3. Where there is evidence on both sides, upon a question of fact, the verdict of a jury is decisive. 1859, *Conklin a. Thompson*, 29 *Barb.*, 218; and see *Sheldon a. Hudson River Railroad Co.*, 29 *Barb.*, 226.
4. But where the evidence on behalf of the successful party, does not establish the facts constituting his cause of action or defence beyond a reasonable doubt, the verdict cannot be maintained. 1859, *Sheldon a. Hudson River Railroad Co.*, 29 *Barb.*, 226.
5. A new trial will be ordered on the ground of the improper exclusion of a witness, although it does not appear probable that his testimony could affect the result. 1859, *Brown a. Richardson*, 20 *N. Y.* (6 *Smith*), 472, 476.
6. A new trial will not be granted because of the exclusion of a witness on the mistaken opinion that he was incompetent, if his evidence could not have affected the result. 1859, *City Bank of Brooklyn a. Dearborn*, 20 *N. Y.* (6 *Smith*), 244.
7. New trial not to be granted for error in receiving the opinions of wit-

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- nesses, unless there is strong probable grounds of believing that injustice was done. *Renaud v. Peck*, 2 *Hilt.*, 137.
8. In an action on an indorsement by a corporation of negotiable paper, the questions whether the indorsement was for accommodation of a third party or for the benefit of the corporation, and if an accommodation indorsement, whether the plaintiff took the note on representations of the officers of the corporation that it was otherwise—are questions for the jury. If the judge decides these points, a new trial should be granted. 1859, *Bridgeport City Bank v. Empire Stone-Dressing Co.*, 30 *Barb.*, 421.
9. *It seems*, that a new trial will not be granted on account of an expression in the charge which could not, under the circumstances, have misled the jury. [2 C. B. (N. S.), 740.] 1859, *Johnson v. Hudson River Railroad Co.*, 20 *N. Y.* (6 *Smith*), 65, 74.
10. Though the rule laid down in the charge was erroneous, and was not excepted to, yet if the jury did not find in conformity to it, a new trial should be granted. 1858, *Rogers v. Murray*, 3 *Bosw.*, 357.
11. A new trial is not to be granted on ground of newly discovered evidence, where the party might have acquired knowledge in season by reasonable diligence. 1859, *Campbell v. Genet*, 2 *Hilt.*, 290.
12. A new trial is not to be granted on the ground of surprise where the party was personally present at the trial, and instead of asking for a postponement, went on with the trial, examining witnesses as to the matter, agreed to submit written points to the court, but delayed doing so, and made no intimation of surprise till ten months after the trial, and three months after the decision of the court. 1860, *Peck v. Hiler*, 30 *Barb.*, 655.
13. If newly discovered evidence consists merely of additional facts and circumstances going to establish the same points which were principally controverted before, or additional witnesses to the same facts and circumstances, it is cumulative, and not a ground for a new trial. [5 *Wend.*, 127.] *Ib.*
14. *It seems*, that no court has power to order a new trial on the merits, after a conviction for felony. 1859, *Quimbo Appo v. People*, 20 *N. Y.* (6 *Smith*), 531, 551, 556.
15. The Oyer and Terminer certainly has not such power. *Ib.*
16. A new trial awarded, on the ground that the case had not been fully considered in certain important aspects. *Mills v. Van Voorhis*, *Ante*, 152.
17. That a motion for a new trial is too late after judgment entered. *Peck v. Hiler*, 30 *Barb.*, 655.

 UNDERTAKING.

UNDERTAKING.

1. An undertaking on appeal to answer for the debt of another, but expressing no consideration, is void, unless given pursuant to the requirements of statute. *Robert a. Donnell, Ante, 454.*
2. Where, in an undertaking given in proceedings of claim and delivery, there were five sureties, and only three justified, and the aggregate amount of their justification was less than double the sum specified in the undertaking,—held insufficient. *Supreme Ct., Chambers, 1857, Graham a. Wells, 18 How. Pr., 377.*
3. Under section 222 of the Code,—prescribing that on granting an injunction the judge shall require an undertaking “on the part of the plaintiff, with or without sureties,”—an approved undertaking, executed by *any* persons of competent ability, agreeing that the plaintiff shall pay to the defendant the damages which he may sustain, and procured and furnished by the plaintiff or his attorney for the security of the defendant, is sufficient. It is not necessary that the plaintiff execute the undertaking. *Leffingwell a. Chave, Ante, 472.*

AMENDMENT, 2.

USURY.

An accommodation indorser of usurious negotiable paper made by a corporation, may interpose the defence of usury. *Hungerford's Bank a. Potsdam & Watertown Railroad Co., Ante, 24.*

VARIANCE.

As to what is a failure to prove the cause of action in its entire scope. *Hall a. Morrison, 3 Bosw., 520.*

AMENDMENT, 11.

VERIFICATION.

1. The verification of a complaint, like that of an answer, should be united in by every party who unites in the pleading, and whose interest is several. *Gray a. Kendall, Ante, 66.*
2. In an action against husband and wife to set aside a conveyance to the wife as void as against creditors, the answer must be verified by both, if relied on as the answer of both. *Sp. T., 1860, Reed a. Butler, 2 Hill., 589.*
3. Where the defendant is privileged from verifying his answer, his

 WAIVER.

proper course is to serve an unverified answer, or an answer verified, but assigning grounds why certain averments in the complaint should not be verified. 1858, *Moloney v. Dows*, 2 *Hill*, 247.

ARREST, 9.

WAIVER.

Plaintiff having entered judgment, notwithstanding an order staying his proceedings, defendant moved to set aside the judgment, and pending the motion, written notice of the judgment being served on him in order to limit his time to appeal, defendant took an appeal from the judgment.

Held, that this was not a waiver of his motion to set aside the judgment. *Clumpha v. Whiting*, *Ante*, 448.

ACTION 4.

WILL.

Of the principles of interpretation of Wills. *Post v. Hover*, 30 *Barb.*, 312; *Van Derzee v. Van Derzee*, 30 *Ib.*, 331; *Terpenning v. Skinner*, 30 *Ib.*, 373.

WITNESS.

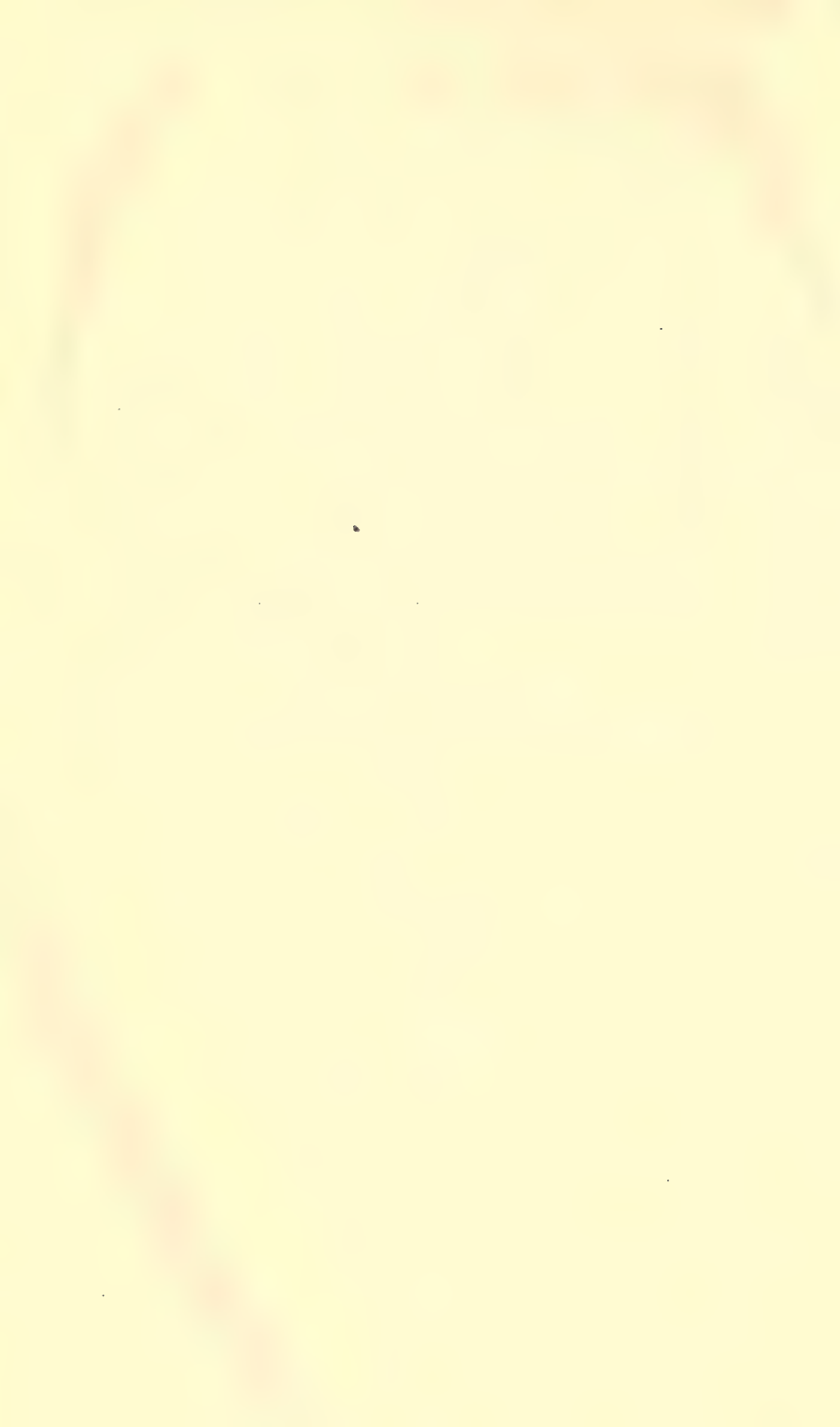
1. In an action against a principal debtor a witness is not rendered incompetent by reason of the fact that his wife is a surety for the debt, having charged her separate estate therewith. The surety is not bound by a judgment against the principal. 1859, *Deck v. Johnson*, 30 *Barb.*, 283.
2. Being sentenced on a conviction for petit larceny, does not disqualify as a witness. *People v. Shay*, *Ante*, 413.
3. An offender against the act of 1859, respecting prize-fighting, may be compelled to testify notwithstanding his answer will tend to convict him. *Laws of 1860*, 225, ch. 141.
4. It is settled in this State, that where the veracity of a witness is impeached only by facts stated by him on his cross-examination, or by proof of contradictory statements in regard to the matter of his testimony, made by him on other occasions, evidence of his general good character, or of his good character for truthfulness, is inadmissible. [3 *Hill*, 309; 5 *Den.*, 106; 1 *Park. Cr.*, 310; 3 *Seld.*, 378; 17 *Barb.*, 489; overruling *People v. Rector*, 19 *Wend.*, 569; *Carter v. The People*, 2 *Hill*, 317.] *Gen. T., VII. Dist.*, 1859, *Frost v. McCargar*, 29 *Barb.*, 617.

WITNESS.

5. Evidence of a statement in conversation by an adverse witness, designed to impeach his testimony, is not admissible until his attention has been called to the occasion, and he has been asked directly, whether he made such a statement. 1859, *Valton a. The National Fund Life Assurance Co.*, 20 *N. Y.* (6 *Smith*), 32.
6. A party cannot impeach his own witness. *So held*, where the witness was the prisoner's wife admitted by consent. *Supreme Ct.*, 1859, *People a. Sanchez*, 18 *How. Pr.*, 72.
7. Any person who was present and heard the testimony of a witness on a former trial, is competent to testify in respect to what he said. [3 *Barb.*, 410.] The judge's memoranda are not evidence. 1859, *Grimm a. Hamel*, 2 *Hilt.*, 434.
8. The provisions of 2 Rev. Stat., 406, § 73, forbidding disclosure of confidential communications by a patient to his physician, do not preclude the physician from testifying to the nature of the disease and the character of the treatment, when he brings an action to recover for his services. 1859, *Kendall a. Grey*, 2 *Hilt.*, 300.
9. In what cases the opinions of witnesses and statements in a book may be received as evidence. *Harris a. Panama Railroad Co.*, 3 *Bosw.*, 7; *Fry a. Bennett*, *Ib.*, 200; *Chessman a. Merkel*, *Ib.*, 402; *Simons a. Monier*, 29 *Barb.*, 420.

COSTS; EVIDENCE; EXAMINATION OF ASSIGNOR; EXAMINATION OF PARTY.

THE END.





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